Petition

81-2063

No. ———

Office - Supreme Court, U.S.
FILED
MAY 7 1982
ALEXANDER L. STEVAS
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

ALBERT LEE SCOTT, JR.,

Petitioner,

v.

STATE OF OHIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO AND THE COURT OF APPEALS FOR THE FIRST APPELLATE DISTRICT OF OHIO

DAVID C. GREER, Trial Attorney

400 Gem Plaza, Third and Main Streets
Dayton, Ohio 45402
Telephone: (513) 223-3277

JOSEPH P. BUCHANAN, Trial Attorney

2580 Winters Bank Tower
Dayton, Ohio 45423
Telephone: (513) 223-6211

Counsel for Petitioner

LEE C. FALKE, Prosecuting Attorney

308 Montgomery County Courts Building
41 North Perry Street
Dayton, Ohio 45402
Telephone: (513) 228-5126

Counsel for Respondent

COURT INDEX PRESS, INC. — 215 E. Ninth Street, Cincinnati, Ohio 45202 — (513) 241-1450

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. ———

ALBERT LEE SCOTT, JR.,

Petitioner,

v.

STATE OF OHIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO AND THE COURT OF APPEALS FOR THE FIRST APPELLATE DISTRICT OF OHIO

QUESTION PRESENTED

The petitioner Albert Lee Scott, Jr. prays that a writ of certiorari issue to review the orders of the Ohio Supreme Court entered in Case No. 82-92 on March 9, 1982 and the decision of the Court of Appeals for the First Appellate District of Ohio entered in Case No. C-810028 on November 18, 1981.

The question presented for review may be stated as follows:

DOES THE CONSTITUTIONAL PROHIBITION AGAINST DOUBLE JEOPARDY BAR PROSCEUTION FOR THE OF-

FENSE OF AGGRAVATED MURDER IN THE COURSE OF KIDNAPPING WHERE THE DEFENDANT HAS BEEN CONVICTED OF THE KIDNAPPING OUT OF WHICH THE MURDER ALLEGEDLY AROSE?

The petitioner submits that this question should be answered in the affirmative. The courts of Ohio have disagreed.

DAVID C. GREER, Trial Attorney

400 Gem Plaza, Third and Main Streets
Dayton, Ohio 45402
Telephone: (513) 223-3277

JOSEPH P. BUCHANAN, Trial Attorney

2580 Winters Bank Tower
Dayton, Ohio 45423
Telephone: (513) 223-6211

Counsel for Petitioner

TABLE OF CONTENTS

Page

QUESTION PRESENTED

DOES THE CONSTITUTIONAL PROHIBITION AGAINST DOUBLE JEOPARDY BAR PROSECUTION FOR THE OFFENSE OF AGGRAVATED MURDER IN THE COURSE OF KIDNAPPING WHERE THE DEFENDANT HAS BEEN CONVICTED OF THE KIDNAPPING OUT OF WHICH THE MURDER ALLEGEDLY AROSE? ..... I-II

TABLE OF CONTENTS III

INDEX TO APPENDIX IV

CITATIONS V

I. OPINIONS BELOW 1

II. JURISDICTION 1

III. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1-2

IV. STATEMENT OF THE CASE 3

V. REASONS FOR GRANTING THE WRIT 4

INDEX TO APPENDIX

		Page
A.	Indictment (10-2-75)	1a
B.	Common Pleas Termination Entry (11-23-76)	3a
C.	Appellate Decision (11-29-78)	6a
D.	State's Motion for Reconsideration	25a
E.	Appellate Entry Granting Motion to Reconsider (12-22-78)	27a
F.	Appellate Decision Upon Reconsideration (1-24-79)	28a
G.	Supreme Court Decision (2-6-80)	30a
H.	Motion to Dismiss (8-18-80)	45a
I.	Common Pleas Order Overruling Defendant's Motion to Dismiss (8-20-80)	50a
J.	Common Pleas Order Discharging Jury (9-30-80)	51a
K.	Motion for Acquittal (10-14-80)	52a
L.	Common Pleas Order Overruling Motion for Acquittal (10-28-80)	59a
M.	Appellate Decision and Entry (11-18-81)	60a
N.	Supreme Court Order Dismissing Appeal (3-9-82)	67a
O.	Supreme Court Order Overruling Motion for Leave to Appeal (3-9-82)	68a

CITATIONS

Cases: Page

Blockburger v. *United States*, 284 U.S. 299 (1932) 5, 8, 9

Brown v. *Ohio*, 432 U.S. 161 (1977) 6, 10, 11

Harris v. *Oklahoma*, 433 U.S. 682 (1972) 6, 7, 9

Illinois v. *Vitale*, 447 U.S. 410, 65 L.Ed.2d 228 (1980) 6, 7, 8, 9

State v. *Moss*, 69 Ohio St.2d 515, 55 Ohio Bar No. 13 (decided 3-3-82) 9

State v. *Thomas*, 61 Ohio St.2d 254, 15 Ohio Ops.3d 262, 400 N.E.2d 897 (1980) 8-9

Whalen v. *United States*, 445 U.S. 684, 63 L.Ed.2d 715 (1980) 7, 8, 9, 10

United States Constitution:

Fifth Amendment 1

Statutes:

28 U.S.C. § 1257(3) 1

Ohio Revised Code, § 2901.04(A) 2

Ohio Revised Code, § 2903.01(B) 2

Ohio Revised Code, § 2923.03(A)(2) 1

I. OPINIONS BELOW

The opinion of the Court of Appeals denying the petitioner's plea of double jeopardy while noting an "apparent inconsistency" between the views of the Ohio Supreme Court and the views of the United States Supreme Court on the subject of double jeopardy is reproduced as Appendix M to this petition. The summary orders of the Ohio Supreme Court declining to undertake a review of the substantive question presented or to resolve the "apparent inconsistency" are reproduced as Appendices N and O.

II. JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3). The state courts of Ohio have decided a federal question in a way which is in conflict with applicable decisions of this Court. The last date of the state court rulings in question was March 9, 1982.

III. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. Fifth Amendment To The United States Constitution:

". . .nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb. . . ."

B. Section 2923.03(A)(2), Ohio Revised Code (Aggravated murder in the course of kidnapping):

"No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary or escape."

C. Section 2903.01(B), Ohio Revised Code (Kidnapping):

"No person, by force, threat, or deception, or, in the case of a victim under the age of 13 or mentally incompetent, by any means, shall remove another from the place where he is found or restrain him of his liberty, for any of the following purposes: . . . to hold for ransom, or as a shield or hostage."

D. Section 2901.04(A), Ohio Revised Code (Aiding and abetting):

"No person, acting with the kind of culpability required for the commission of an offense, shall . . . aid or abet another in committing the offense. . . .

IV. STATEMENT OF THE CASE

This case arose from an incident in which a Dayton, Ohio businessman was kidnapped and held for ransom. The ransom money was paid, and the victim was subsequently found in a field where he had died of gunshot wounds. The petitioner and two other men were arrested and separately tried. The petitioner acknowledged that he had been involved in writing the ransom note and in picking up the ransom money. He denied, however, that he ever had any contact of any sort with the victim of the kidnapping, and he claimed that he had a clear understanding with the other participants in the scheme that they would release the victim unharmed regardless of his success or lack of success in obtaining the ransom money. The State claimed that the petitioner was not only responsible for the kidnapping, but also – as either a principal or an aider and abettor – for the offense of aggravated murder in the course of a kidnapping. Its indictment is attached to this petition as Appendix A.

On November 23, 1976, the petitioner, after a four-week trial before a jury in Hamilton County, Ohio, was convicted of one count of aggravated murder while committing the offense of kidnapping, one count of kidnapping and one count of extortion (Appendix B). On appeal, his convictions were reversed because of the Trial Court's error in instructing the jury (Appendix C). On motion of the State for reconsideration, the Court of Appeals changed its ruling and permitted the convictions for kidnapping and extortion to stand while remanding the case for a new trial on the charge of aggravated murder in the course of a kidnapping (Appendices D, E and F). The Ohio Supreme Court reviewed the case on its merits, and it affirmed with modification the decision of the Court of Appeals (Appendix G). Its decision is reported at 61 Ohio St.2d 155, 15 Ohio Ops.3d 182, 400 N.E.2d 375 (1980).

Since the charge of aggravated murder in the course of a kidnapping cannot be established without proof by the State

of the essential elements of the crime of kidnapping and since his conviction for kidnapping was no longer subject to any appellate process, the petitioner filed a motion in the Trial Court to dismiss the aggravated murder indictment on the ground that the State's prosecution of the indictment was barred by the double jeopardy clauses of the United States Constitution and the Ohio Constitution (Appendix H). That motion was denied (Appendix I), and the petitioner on September 3, 1980 went to trial on the charge of aggravated murder in the course of the kidnapping. On September 30, 1980, the jury was discharged because it failed to reach a verdict (Appendix J).

A motion for acquittal on double jeopardy grounds under the United States and Ohio Constitutions was then filed in the Trial Court and denied (Appendices K and L). The Court of Appeals of Hamilton County affirmed this ruling of the Trial Court on the basis of a prior ruling of the Ohio Supreme Court, but noted that the Ohio Supreme Court's ruling appeared to be at variance with the analysis of double jeopardy espoused by the United States Supreme Court (Appendix M). The Ohio Supreme Court, in the exercise of its discretionary jurisdiction, refused to consider the case on its merits (Appendices N and O).

V. REASONS FOR GRANTING THE WRIT

The guarantees of personal freedom contained in the United States Constitution should not mean something different in Ohio from what they mean in the other states of the union. Yet the Ohio Supreme Court in a series of decisions has made it clear that it has no intention of applying the Fifth Amendment right of freedom from double jeopardy as that right has been analyzed and expounded by this Court.

At stake in this case is not only the personal freedom of the petitioner who has already endured two lengthy jury trials for the same offense and who will be tried a third

time unless this Court intervenes. The rights of other citizens charged with crime in Ohio to be free from multiple prosecutions are also at stake. Also at stake is the very fabric of the Constitution itself. If the states are free to spin off variant interpretations of constitutional guarantees, the Constitution becomes an illusory document and this Court's role as its interpreter loses significance.

The petitioner has been convicted of the offense of kidnapping, and his conviction for that crime is no longer subject to any appellate process. The State now wants to try him for the offense of aggravated murder in the course of the same kidnapping. All of the elements of the offense of kidnapping have to be proved by the State in its aggravated murder case. While there are murder offenses under the Ohio statutes which would not depend upon proof of an underlying kidnapping, the specific offense charged cannot be established without such proof (Appendix A). It is also clear that the offense of kidnapping did not require proof of any fact not required to prove the greater offense of aggravated murder in the course of kidnapping.

Were it not for state court sophistry, there could be no doubt as to the constitutional rule governing such a situation.

> "The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not. . . ."

Blockburger v. *United States*, 284 U.S. 299, 304 (1932). The underlying rationale for this rule is that a lesser-included offense and a greater offense are considered to be "the same offense" as that term is used in the Fifth Amendment double jeopardy clause.

> "It has long been understood that separate statutory crimes need not be identical – either in constituent

> elements or in actual proof – in order to be the same within the meaning of the constitutional prohibition."

Brown v. *Ohio*, 432 U.S. 161, 164 (1977). Since kidnapping is a lesser-included offense of aggravated murder in the course of kidnapping, the two offenses are the same offense for purposes of invoking the double jeopardy protection against a second prosecution.

This Court considered the precise obverse of this case in *Harris* v. *Oklahoma*, 433 U.S. 682 (1972). The defendant in that case had been convicted of felony-murder in a situation where a grocery store clerk was shot and killed in the course of a robbery. Thereafter, he was brought to trial and convicted on the robbery charge. This Court held that such prosecutorial action offends the Constitution.

> "When, as here, conviction of a greater crime, murder, cannot be had without conviction for the lesser crime, robbery with firearms, the Double Jeopardy Clause bars prosecution for the lesser crime after conviction of the greater one."

433 U.S. at 682.

Logic compels the same result where, as here, a conviction has been obtained on the lesser offense and the State subsequently seeks to prosecute the defendant on the greater offense. This Court, unlike the Ohio Supreme Court, has acknowledged this logic and held that the constitutional basis for the rule likewise bars prosecution under such circumstances.

> ". . . (A) conviction on a lesser-included offense bars subsequent trial on the greater offense."

Illinois v. *Vitale*, 447 U.S. 410, 65 L.Ed.2d 228, 238 (1980).

Section 2903.01(B) of the Ohio Revised Code, on its face, does not require proof of kidnapping to establish aggravated murder. Other felonies (*i.e.*, rape, arson, robbery, burglary or escape) can underlie an aggravated murder prosecution. How-

ever, for purposes of invoking the double jeopardy protection against a second prosecution for the same offense following a conviction, aggravated murder in the course of kidnapping must be considered as a separate statutory offense and kidnapping as a lesser-included offense.

> ". . . it may be that to sustain its manslaughter case the state may find it necessary to prove a failure to slow or to rely on conduct necessarily involving such failure; it may concede as much prior to trial. In that case, because Vitale has already been convicted for conduct that is a necessary element of the more serious crime for which he has been charged, his claim of double jeopardy would be substantial under *Brown* and our later decision in *Harris* v. *Oklahoma*. . . ."

Illinois v. *Vitale*, 447 U.S. 410, 65 L.Ed.2d 228, 238 (1980).

This conclusion was reinforced by this Court's holding in *Whalen* v. *United States*, 445 U.S. 684, 63 L.Ed.2d 715, 725 (1980):

> "The Government contends that felony murder and rape are not the 'same' offense under *Blockburger*, since the former offense does not in all cases require proof of a rape; that is, D.C. Code Section 22-2401 proscribes the killing of another person in the couse of committing rape or robbery or kidnapping or arson, etc. Where the offense to be proved does not include proof of a rape – for example, where the offense is a killing in the perpetration of a robbery – the offense is of course different from the offense of rape, and the Government is correct in believing that cumulative punishments for the felony murder and for a rape would be permitted under *Blockburger*. *In the present case, however, proof of rape is a necessary element of proof of the felony murder, and we are unpersuaded that this case should be treated differently from other cases in which one criminal offense requires proof of every element of another offense.* There would be no question in this regard if Congress, instead of listing the six lesser included offenses in the alternative, had

> separately proscribed the six different species of felony murder under six statutory provisions. It is doubtful that Congress could have imagined that so formal a difference in drafting had any practical significance, and we ascribe none to it."

In this case the State of Ohio must prove kidnapping in order to prove aggravated murder in the course of kidnapping. The petitioner has already been convicted of kidnapping. Double jeopardy therefore bars the State's present efforts to prosecute him for the greater offense.

The Ohio Court of Appeals in this case felt compelled by a prior decision of the Ohio Supreme Court to deny the petitioner's claim of double jeopardy. By the same token, it noted that the petitioner's claim would have to be sustained if the decisions of this Court rather than decisions of the Ohio Supreme Court were followed:

> "As we have previously stated . . . an apparent inconsistency exists in the application of the *Blockburger* analysis as applied by the United States Supreme Court in *Whalen* v. *United States* (1980), 445 U.S. 684, and the Ohio Supreme Court in *State* v. *Thomas, supra.* However, unless and until the Ohio Supreme Court mandates otherwise, we are constrained to apply the *Blockburger* test in the manner previously set forth in this decision. . . ."

Appendix M, p. 65a.

As noted by the Ohio Court of Appeals, the Ohio Supreme Court — in direct contravention of the holdings of this Court in *Vitale* and *Whalen* — has chosen to ignore the necessary elements of proof in a given case and has instead applied the *Blockburger* analysis abstractly to the statutes.

> "This test focuses upon the elements of the two statutory provisions, not upon the evidence proffered in a given case."

State v. *Thomas,* 61 Ohio St.2d 254, 259, 15 Ohio Ops.3d

262, 400 N.E.2d 897 (1980). This error might be excused on the ground that *Thomas* was decided before the decisions of this Court in *Vitale* and *Whalen* were rendered were it not for the fact that the Ohio Supreme Court refused to correct its error by resolving the present case and compounded its error by another decision rendered six days before its dismissal of this petitioner's appeal.

In that recent case the Ohio Supreme Court upheld convictions and consecutive sentences in a single trial for aggravated burglary and aggravated murder in the course of the same burglary. *State* v. *Moss*, 69 Ohio St.2d 515, 55 Ohio Bar No. 13 (decided 3-3-82). It was careful to distinguish its holding from a case like this case which involves multiple prosecutions for the same crime.

> "The (double jeopardy) clause offers threefold protection for a defendant. 'It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." . . . In the cause *sub judice*, it is the third of the tripartite guarantees that is in issue and which we address herein. Consequently, the decisional law pertaining to multiple punishments for the same criminal activity is the only constiutional focus for this court. . . . Thus, in the context of the case at bar, appellee's reliance on *Harris* v. *Oklahoma* (1977), 433 U.S. 682, its progeny and other cases of its genre, involving multiple *prosecutions* for the same crime, is misplaced."

69 Ohio St.2d at 518.

Its refusal to consider this multiple prosecution case six days after its decision in *Moss*, however, suggests that the Ohio Supreme Court considered its own distinction a distinction without a difference. This Court has itself held that in most situations the same principles apply to consecutive sentences at a single trial and to successive prosecutions.

> "If two offenses are the same under this (*Blockburger*)

> test for purposes of barring consecutive sentences at a single trial, they necessarily will be the same for purposes of barring successive prosecutions. . . . Where the judge is forbidden to impose cumulative punishment for two crimes at the end of a single proceeding, the prosecutor is forbidden to strive for the same result in successive proceedings. Unless 'each statute requires proof of an additional fact which the other does not' . . . the Double Jeopardy Clause prohibits successive prosecutions as well as cumulative punishment."

Brown v. *Ohio*, 432 U.S. 161, 166. The rule, however, is not without qualification:

> "Even if two offenses are sufficiently different to permit the imposition of consecutive sentences, successive prosecutions will be barred in some circumstances where the second prosecution requires the relitigation of factual issues already resolved by the first."

Id. at n. 6. Both the rule and its qualification apply to the present case. The kidnapping statute does not require proof of any fact not required to be proven to establish aggravated murder in the course of kidnapping, and prosecution of the petitioner will require relitigation of factual issues already resolved by his conviction for kidnapping.

The Ohio Supreme Court's construction of the Constitution would apparently "justify" a conviction of the petitioner for aggravated murder on the ground that under the State statute such a conviction can be obtained upon proof of some underlying felony other than kidnapping. As this Court pointed out in *Whalen*, such reasoning is specious in the context of this case where the only conceivable underlying felony — indeed the underlying felony specifically named in the indictment — is the very crime of kidnapping of which the defendant has already been convicted. The Constitution, we trust, applies to facts in the real world, not to abstractions divorced from reality.

The two highest functions entrusted by the people to this Court are the interpretation of constitutional guarantees of freedom and the maintenance of those guarantees. If state courts are permitted to whittle away those guarantees with variant and aberrant interpretations, the structure of our system has been undermined and the concept of justice to which that system is dedicated has been diminished. The reversal of its decision in the *Brown* case has done nothing to correct the insensitivity of the Ohio Supreme Court to the concept of double jeopardy. Intervention by this Court is again required to maintain the viability of that concept in Ohio and to demonstrate to this petitioner that the rights contained in the Constitution were granted to him as well as to all other citizens of this country.

Respectfully submitted,

DAVID C. GREER, Trial Attorney

400 Gem Plaza, Third and Main Streets
Dayton, Ohio 45402
Telephone: (513) 223-3277

JOSEPH P. BUCHANAN, Trial Attorney

2580 Winters Bank Tower
Dayton, Ohio 45423
Telephone: (513) 223-6211

Counsel for Petitioner

Appendix

APPENDIX A

THE STATE OF OHIO, MONTGOMERY COUNTY

THE COURT OF COMMON PLEAS
September Terms in the year
Nineteen Hundred and Seventy-Five

75-CR-1359

(Filed October 2, 1975)

MONTGOMERY COUNTY, ss.

THE GRAND JURORS of the County of Montgomery, in the name, and by authority of the State of Ohio, on their oaths do present and find that ALBERT LEE SCOTT, JR. on or about the 23rd day of September in the year one thousand nine hundred and seventy-five in the County of Montgomery, aforesaid, and State of Ohio, did purposely cause the death of Lester C. Emoff, while committing the offense of Kidnapping; contrary to the form of the statute (in violation of Section 2903.01(B) of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

SPECIFICATION: The Grand Jurors further find and specify that the said ALBERT LEE SCOTT, JR., committed the offense presented above for the purpose of escaping detection, apprehension, trial or punishment for another offense committed by the of-

fender, to-wit: Kidnapping, in violation of Section 2929.04(A)(3), Ohio Revised Code.

SPECIFICATION: The Grand Jurors further find and specify that the offense presented above, the murder of Lester C. Emoff, was committed while the said ALBERT LEE SCOTT, JR., was committing the offense of Kidnapping, in violation of Section 2929.04(A)(7), Ohio Revised Code.

SECOND COUNT:

And the grand jurors of this County, in the name and by the authority of the State of Ohio, upon their oaths, do find and present that: ALBERT LEE SCOTT, JR., on or about the 23rd day of September, 1975, in the County of Montgomery, aforesaid, and State of Ohio, did by force, threat or deception, remove another, to-wit: Lester C. Emoff from the place where he was found and restrain him of his liberty for the purpose of holding the said Lester C. Emoff for ransom and did not release him in a safe place unharmed; contrary to the form of the statute (in violation of Section 2905.01(A)(1) of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

THIRD COUNT:

And the grand jurors of this County, in the name and by the authority of the State of Ohio, upon their oaths, do find and present that; ALBERT LEE SCOTT, JR., on or about the 23rd day of September, 1975, in the County of Montgomery, aforesaid, and State of Ohio, did with purpose to obtain any valuable thing or valuable benefit, to-wit: Four Hundred Thousand Dollars ($400,000), threaten to commity any felony and/or threaten to commit any felony of violence; contrary to the form of the statute (in violation of Section 2905.11(A)(1) and/or 2905.11(A)(2) of the Ohio Revised Code) in such

case made and provided, and against the peace and dignity of the State of Ohio.

LEE C. FALKE,
Prosecuting Attorney
Montgomery County, Ohio

By /s/ JAMES A. BROGAN
Assistant Prosecuting Attorney

APPENDIX B

IN THE COMMON PLEAS COURT OF
MONTGOMERY COUNTY, OHIO

CASE NO. 75-CR-1359

STATE OF OHIO

Plaintiff

vs.

ALBERT LEE SCOTT, JR.

Defendant

TERMINATION ENTRY

(Filed November 23, 1976)

This matter came on for a Mitigation Hearing on this 19th day of November, 1976 in accordance with Section 2929.03 (E), Ohio Criminal Code, and upon consideration of the

report, testimony, evidence, statement of defendant and arguments of Counsel which were submitted to the Court in accordance with Section 2929.03(D), Ohio Criminal Code, the Court finds that none of the mitigating circumstances listed in Section 2929.04(B) are established by a preponderance of the evidence.

WHEREFORE, the defendant, ALBERT LEE SCOTT, JR., having been convicted of the offenses of:

> Aggravated Murder (Section 2903.01(B) and the Specification thereunder (Section 2929.04(A)(7);
>
> Kidnapping (Section 2905.01 (A)(1); and
> Extortion (Section 2905.11(A)(1);

and the said defendant being present in open Court with Counsel was inquired of by the Court if he had anything to say why judgment should not be pronounced against him, and having nothing further to say than he hath already said, it is ORDERED AND ADJUDGED BY THE COURT that for the offense of Aggravated Murder and the specification thereunder the defendant, Albert Lee Scott, Jr., be elctrocuted by the Warden of the Southern Ohio Correctional Facility (or in his absence by a Deputy Warden) by causing a current of electricity of sufficient intensity to cause death to pass through his body, the application of such current to be continued until the said Albert Lee Scott, Jr., is dead, the sentence as herein imposed to be executed on the 12th day of April, 1977 at the Southern Ohio Correctional Facility, Lucasville, Ohio; and for the offense of Kidnapping the Court Orders that the said Albert Lee Scott, Jr. be imprisoned at the Correctional Medical and Reception Center, Columbus, Ohio for a period not less than seven (7) years nor more than twenty-five (25) years; and for the offense of Extortion the Court Orders that the said Albert Lee Scott, Jr. be imprisoned at the Correctional Medical and Reception Center not less than three (3) years nor more than ten (10) years, all of said sentences to be served consecutively; cost are taxed

at $..... The defendant is to receive credit for ..... days spent in confinement.

The Court instructed the defendant that he has a right to file a direct appeal to the Second District Court of Appeals within thirty (30) days and that if indigent a right to prosecute an appeal without expense and with counsel appointed by the Court to be paid by the State; further, if he is unable to pay the cost of documents necessary to an appeal, such documents will be provided without cost. Upon inquiry the defendant indicated in open Court that he understood his rights of appeal as explained by the Court.

The defendant is sentenced under Section 2903.01(B), 2929.04(A)(7), 2905.01(A)(1) and 2905.11A(1), Ohio Criminal Code.

The Sheriff of Montgomery County is ordered to convey defendant forthwith to the Correctional Medical and Reception Center, Columbus, Ohio.

/s/ STANLEY S. PHILLIPS
JUDGE

APPROVED:

LEE C. FALKE
PROSECUTING ATTORNEY

BY /s/ WALTER L. DODSWORTH
Assistant Prosecuting Attorney

By .....
Joseph A. Koenig
Assistant Prosecuting Attorney

By .....
James R. Levinson
Assistant Prosecuting Attorney

SEEN BUT NOT APPROVED
/s/ DAVID C. GREER
Attorney at Law
8 N. Main Street, Dayton, Ohio

SEEN BUT NOT APPROVED
/s/ JOSEPH P. BUCHANAN
Attorney at Law
Winters Bank Tower, Dayton, Ohio

APPENDIX C

IN THE COURT OF APPEALS
FIRST APELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

NO. C-76900

STATE OF OHIO,
Plaintiff-Appellee,

vs.

ALBERT LEE SCOTT, JR.,
Defendant-Appellant.

DECISION

(Filed November 29, 1978)

Messrs. Lee C. Falke, James A. Brogan, and Herbert Creech, Jr., 308 Montgomery County Courts Building, 41 North Perry Street, Dayton, Ohio 45402, for Plaintiff-Appellee,

Messrs. Beiser, Greer & Landis, David C. Greer of counsel, 8 North Main Street, Dayton, Ohio 45402, and

Mr. Joseph P. Buchanan, 2580 Winters Bank Tower, Dayton, Ohio 45402, for Defendant-Appellant.

PER CURIAM.

This cause came on to be heard upon the appeal, the transcript of the docket, journal entries and original papers from the Courts of Common Pleas of Montgomery and Hamilton Counties, the transcript of the proceedings, the briefs and the arguments of counsel.

Appellant was arrested on September 25, 1975 in connection with the kidnapping and murder of a well-known Dayton area businessman, Lester C. Emoff. He was indicted by the Montgomery County Grand Jury on one count of murder while committing the offense of kidnapping under R.C. 2903.-01(B) with two specifications under R.C. 2929.04(A)(3) and R.C. 2929.04(A)(7). In addition, he was charged with one count of kidnapping under R.C. 2905.01(A)(1) and one count of extortion under R.C. 2905.11(A)(1) and/or R.C. 2905.11 (A)(2). Appellant pled not guilty to all of the charges.

Due to extensive pre-trial publicity, appellant's motion for a change of venue was granted, and his trial was held in Hamilton County, Ohio. A jury convicted appellant of all counts in the indictment including one specification. At a later mitigation hearing, the trial court found that none of the mitigating factors listed in R.C. 2929.04(B) were applicable. Appellant was accordingly sentenced to death. Appellant thereafter perfected his appeal to this court and presents nine assignments of error for our consideration.

Appellant's first assignment of error concerns the trial court's charge to the jury on aiding and abetting in conjunction with an instruction the court gave to the jury on that subject at their request.

When the court charged the jury on aiding and abetting, it did not use language to the effect that when two or more persons join together in a common purpose to commit a criminal act, each of them is criminally liable for any act done by any one of them in furtherance of their common purpose if such act might have been reasonably foreseen by the others

as probable or likely to result from an attempt to commit the crime intended. Defense counsel made no objection to the omission of this language from the charge.

After the jury had deliberated for some time, it requested more information as to the law of aiding and abetting. The trial court re-read that portion of its original charge to them, and defense counsel again did not object to the language of the charge with respect to the language which we previously noted was omitted.

However, after further deliberation, the jury submitted the following question to the court:

> According to the *law*, if a defendant is guilty of kidnapping and the victim is never released alive even though the defendant had no knowledge of nor participation in the murder, by reason of being implicated in the kidnapping is he also guilty of aiding and abetting the murder? [Signed] T. Ackerman

The court read the question to counsel in chambers and indicated to them that he felt the correct answer to this question was that such a defendant was also guilty of aiding and abetting murder. Defense counsel objected to the court's response and proposed that the court instruct the jury that in order for the question to be answered in the affirmative, several specific factors would first have to be established beyond a reasonable doubt, among them being that the murder was the natural and probable result of the kidnapping. The court overruled defense counsel's request on the basis that these points had been mainly covered in the general charge. Of course, the instruction that the murder must be reasonably likely to be a natural and probable consequence of the kidnapping had not been so included, and defense counsel did not so inform the court. The court then proceeded to answer the jury's question in the language that he had indicated he would use to counsel previously.

We find that the trial court's answer to the jury was an

incorrect statement of the law. The law is that if the common purpose of several defendants resulted in a killing, and if the manner of performance of the criminal act could have been reasonably contemplated as likely to produce death, in that event an aider and abettor is equally guilty with the principal of the consequences naturally and probably arising from the furtherance of the common plan. *State* v. *Lockett* (1976), 49 Ohio St. 2d 48, 358 N.E.2d 1062; *Goins* v. *State* (1889), 46 Ohio St. 456, 21 N.E. 476; *Stephens* v. *State* (1884), 42 Ohio St. 2d 150; *State* v. *Palfry* (1967), 11 Ohio App. 2d 142, 229 N.E.2d 76. As pointed out by appellant, the effect of the court's instruction was to remove the question from the jury of whether the victim's death was reasonably foreseeable as a natural and probable consequence of the kidnapping. It is the jury that should determine whether the murderer's act was that of his associates as well as his own. *Stephens* v. *State, supra.* As such, we find the trial court's answer to the jury concerning appellant's criminal liability for Emhoff's murder in the event he was guilty of the kidnapping to be prejudicial error.

We likewise find that defense counsel's objection to this answer and his proposed alternate response was sufficient, although minimally so, to preserve this assignment of error. Although the omission of the suggested language, that the victim's death must be a reasonably foreseeable consequence which could naturally and probably arise from the crime, appears to be an oversight on the part of both court and counsel, in the interests of fairness and because counsel did mention it at an appropriate time, we find that appellant was entitled to whatever benefit such an instruction might have given him. Appellant's first assignment of error is sustained in this regard only.

Appellant's second basis for his first assignment of error, that one cannot be convicted as an aider and abettor in Ohio unless it is established beyond a reasonable doubt that he shared the culpable mental state required for the commission of the principal offense is clearly without merit. *State* v.

Lockett, supra, overruled on other grounds, *Lockett* v. *State* (1978), — U.S. —, 57 L. Ed. 2d 973.

Appellant's second assignment of error is that the trial court erred prejudicially when it refused to grant a mistrial upon the basis of statements made by a bailiff in the presence of some members of the jury which concerned the criminal justice system.

The bailiff involved was the bailiff of the local judge who usually had the courtroom which was used for appellant's trial. One of the jurors brought to the attention of the trial court's bailiff that this man had been in the jury room with the jurors during their recesses, and had carried on conversations with them. As the jury was not sequestered, there was no particular reason that the bailiff should not have been there. However, the juror reported that he had made some remarks to the effect that some people were punished too strongly while others got off with probation or parole and that it had bothered her. The trial court informed counsel and conducted a *voir dire* of each juror separately. Most of the jurors had no recollection of the bailiff discussing the criminal justice system. Those that did stated that the discussion had no influence on them insofar as appellant's case was concerned, and that nothing the bailiff said related to appellant's case. The only juror that did not so state, but that had heard the bailiff speaking with the jurors, was so nervous that her answers were unintelligible. From her testimony, it is unclear whether she heard the bailiff discuss the criminal justice system at all.

At the end of the *voir dire* of the jury, defense counsel moved for a mistrial. The judge overruled the motion on the basis that the jurors who heard the questioned remarks had not been influenced by them.

Later the bailiff was located and interrogated by the court. He related that he had had a general discussion with one of the jurors about probation and parole but that nothing

relating specifically to appellant's trial had been mentioned. At the end of his testimony, defense counsel renewed its motion for a mistrial which the trial court again overruled, on the basis that the bailiff's testimony had not changed his mind.

Under the circumstances, we find that our decision in this matter is governed by the principles we set forth in *State* v. *Wilson*, Nos. C-76660, C-76796, (1st Dist. Feb. 1, 1978). That is, since the trial court in the instant case did *voir dire* all concerned about the contact between the bailiff and the jurors, and this examination revealed that the contact was not about a matter pending before the jury, any question of presumptive prejudice to appellant had been laid to rest. See *Remmer* v. *United States* (1954), 347 U.S. 227. Nor do we find, from the record, any prejudice to appellant as a result of the conversation between bailiff and jurors. To the contrary, the jurors involved testified that their decision regarding appellant would not be influenced in any way by the discussion. As such, we certainly cannot say that the trial court abused its discretion in overruling appellant's request for a mistrial on the grounds of prejudicial interchanges. See also *United States* v. *Brumbaugh* (6th Cir. 1973), 471 F.2d 123, *cert. den.* 412 U.S. 918. Appellant's second assignment of error, being without merit, is overruled.

The third assignment of error which appellant presents for our consideration is that the trial court prejudicially erred in refusing to suppress evidence seized in a warrantless search of appellant's automobile, a gray Mustang.

The record from the suppression hearing shows that the police discovered from interviewing appellant's wife subsequent to appellant's arrest that she and her husband owned the Mustang and were the primary users of the car. Appellant's wife told the officer that she would be willing to allow a search of the car, and she signed a consent form. The officers conducted the search immediately thereafter, without

obtaining a warrant for the search. It was stipulated that the vehicle was registered in appellant's name only. Appellant testified that his wife occasionally used the Mustang and could do so whenever she wished.

Thus, from the record, the merit of this assignment of error turns on the validity of a wife's consent to a search of a family car registered in her husband's name only, for a warrantless search may be justified by proof of voluntary consent from a third party who possesses common authority over, or other sufficient relationship to, the premises or effects sought to be inspected. *United States* v. *Matlock* (1973), 415 U.S. 164, 171. There are three Ohio cases on this subject which are pertinent to the issue under consideration, but of which none are directly on point. The Supreme Court ruled in *State* v. *Bernius* (1964), 177 Ohio St. 155, 203 N.E.2d 241, that the consent of a casual borrower of a car to a search, without the express consent of the owner, will, as against the owner, be unreasonable. On the other hand, a wife's consent to search the home of herself and her husband has been held to have rendered the search a reasonable one, even though the wife was alleged to be antagonistic toward her husband. *State* v. *McCarthy* (1971), 26 Ohio St. 2d 87, 269 N.E.2d 424. In that case, the court, in reaching its decision, discussed the case of *State* v. *Corder* (1966), 9 Ohio St. 2d 1, 222 N.E.2d 620. In *Corder*, parents of a minor defendant permitted the police to enter the home and see the defendant's clothes and motorbike. The language from *Corder* which the court in *McCarthy* found persuasive was as follows:

> The general rule is that a parent who owns or controls the premises in which a child resides has the right to consent to a search thereof, even though such search may produce incriminating evidence against the child. *State* v. *McCarthy, supra* at p. 10

Applying these principles to the instant case, we are of the opinion that a wife who has an equal right to use an

automobile with her husband is in a vastly different category than a casual borrower. Where her consent to search the jointly-used automobile was freely, knowingly and voluntarily given, we find that her consent renders the search a reasonable one. Thus, under the facts gleaned from the record of the suppression hearing, appellant's wife's consent was sufficient to validate the officer's subsequent search of the vehicle. Appellant's third assignment of error is overruled.

In his fourth assignment of error, appellant asserts that he was prejudiced by the court's refusal to instruct on the lesser included offense of involuntary manslaughter.

Appellant testified in his own defense. The essence of his testimony was that while appellant aided and abetted the kidnapping, he had nothing to do with and no knowledge of the murder of the victim. Nonetheless, his actions in assisting the kidnapping make him equally guilty with the principal offender for the felony murder if the unlawful act and the manner of its performance would be reasonably likely to produce death, although appellant was neither present nor had knowledge of the physical killing. *State* v. *Lockett* (1976), 49 Ohio St. 2d 48, 358 N.E.2d 1062, overruled in part, 51 Ohio St. 2d 47, 364 N.E.2d 1140 (1977) rev. on other grounds — U.S. —, 157 L.Ed. 2d 973. Thus, appellant's defense does not furnish an evidentiary basis for an instruction on the lesser included offense of involuntary manslaughter. Nor was there other evidence tending to show that the killing was done unintentionally and without malice by or as the result of provocation of the principal. There being an absence of evidence tending to show any other grade of homicide than that of aggravated murder, the trial court correctly refused to charge on the lesser included offense of involuntary manslaughter. *Bandy* v. *State* (1921), 102 Ohio St. 384, 131 N.E. 499. Appellant's fourth assignment of error is overruled.

Appellant next contends, in his fifth assignment of error,

that the trial court prejudicially erred in refusing to admit evidence relevant to the question of the credibility of a key state witness.

The witness, Estell Buck, testified to an alleged statement by appellant to him, made while both were incarcerated, to the effect that appellant told Buck that he had participated in the killing. After Buck's testimony, it came to defense counsel's attention that Buck, at one time had been found to be a psychopathic offender. The defense tried to introduce a certified copy of the entry of this finding into evidence, for purposes of impeaching Buck's credibility, but the trial court refused to allow it. The reasons given by the trial court for refusing this evidence were: that the entry of the finding was nine years old; that Buck, as a result of that finding, was committed to a state hospital and eventually released; that Buck was currently doing penitentiary time which meant that at the moment no one had found him to be in need of hospitalization; and so, there was a fair implication that the man was cured. The court found that under these circumstances it would be unfair to allow the entry in, standing alone. The court did offer defense counsel the option to bring in expert testimony concerning psychopathic offenders, in which case it would reserve ruling on the admissibility of the entry. Defense counsel rejected this option as impossible due to the time factor involved.

We find that the better rule to follow under these circumstances is stated in 98 C.J.S. *Witness* Sec. 486 as follows:

> A witness may be cross-examined to test his intelligence, this rule applying although the court has held him competent to testify; and, as bearing on the credibility of his testimony, he may be cross-examined as to his mental condition at the time of testifying, or at the time to which his testimony referred, his physical condition at that time, and his mental attitude toward the case. (Footnotes omitted.)

See also 3A J. Wigmore *Evidence* Secs. 931-36 (3 ed. 1970). As there was no evidence that Buck's psychopathic condition was in existence or likely to exist at the time appellant allegedly made the statement concerning which Buck testified, or at the time of Buck's testimony, we find that the trial court properly excluded the certified copy of the entry finding that Buck was a psychopathic offender from evidence. Appellant's fifth assignment of error is overruled.

Appellant's sixth assignment of error is that the trial court erred in refusing to suppress statements made by appellant to law enforcement officers. The statements in question can be divided into two categories, those which appellant made prior to the arrival of his attorney, and those which were made after.

The record shows that appellant and his wife returned home around 4:00 p.m. on September 25. They found that their front door had been smashed in and that FBI agents were in their home in the process of executing search warrants. Appellant and his wife agreed to accompany the agents to the F.B.I. offices for questioning. Once there, appellant was placed in a room by himself from approximately 6:00 p.m. until 9:30 p.m. while agents questioned his wife. At 9:30 p.m. the agents read appellant his rights and then let appellant read them. Appellant told the agents that he understood his rights, and, although he refused to sign a waiver of rights form, he agreed to answer questions. Appellant was questioned until 1:55 a.m. the following morning, at which time the agents placed him under arrest. The agents testified that appellant did not request an attorney, nor did he ask to use a telephone. He was offered food and drink and, except for a glass of tomato juice, refused them. Appellant's testimony concerning what occurred during this period of time conflicted with that of the agents, appellant stating that he repeatedly asked for an attorney but was not furnished one. Appellant was given an initial appearance around 3:30 a.m. that morning where he was again advised of his rights

by the judge. Following that appearance, the agents, wanting to question appellant further, followed the same procedure as in the initial interview. Appellant stated at this time that he would answer no more questions and wanted an attorney. Accordingly, the agents halted the interview and proceeded to call appellant's counsel.

The fact that appellant refused to sign a written waiver of his constitutional rights, by itself, does not render statements inadmissible which are given after a full warning with respect to those rights. *United States* v. *Vaughn* (6th Cir. 1974), 496 F.2d 622. We find ample evidence in the record to support the trial court's determination that statements made by the appellant prior to the arrival of his attorney were made after appellant had been advised of his rights, with an understanding of those rights, and were given freely and voluntarily by him. As it is a well-established principle of law that the resolution of conflicts in testimony involving the credibility of witnesses is for the trier of fact, *State* v. *DeHass* (1976), 10 Ohio St. 2d 230, 227 N.E.2d 212, we find the trial court's decision not to suppress these statements to be without error.

The admissibility of the statements made by appellant after the arrival of his attorney is also contested by appellant on the basis of representations made by law enforcement officers to appellant to the effect that as their primary concern was finding the victim of the kidnapping alive, any statements made by appellant would not be used against him.

The transcript clearly reveals that there was an agreement made with regard to such statements as well as to what charges would be filed against appellant. The agreement was made between the law enforcement officials, appellant and his attorneys. Appellant's attorneys, who were not trial counsel, testified that their understanding of the agreement was that it was to be conditioned on a polygraph examination of appellant. The agreement was that if such examination would show that appellant was being truthful in his assertion that he had no knowledge of what had been done with the

victim, in exchange for his help in locating the victim, the charges against him would be only abduction if the victim were found alive and only kidnapping if he were found dead. Appellant's counsel testified that appellant was made aware of this condition and agreed to it. Thus, the argument that statements made by appellant would not be used against him only pertained if appellant's subsequent taking of a polygraph examination showed him to be truthful regarding his knowledge of and involvement in the kidnapping. As the results of the polygraph did not show this, the agreement was no longer in effect, and we do not find that the trial court erred by refusing to suppress those statements made by appellant after his counsel arrived. Appellant's sixth assignment of error is without merit, and we overrule it.

Appellant's seventh assignment of error states that the court erred in refusing to enforce the plea bargain discussed in our treatment of appellant's assignment of error numbered six. As previously noted, the plea bargain was conditioned on the truthfulness of appellant's statements. As appellant failed to meet that condition, the plea bargain was no longer enforceable. Appellant agreed to the conditions of the plea bargain, and his attorneys testified that they felt that the prosecution had met their commitment under the terms of the agreement. We find that the trial court correctly determined that the plea bargain agreement had been complied with under its terms. Consequently, appellant's seventh assignment of error is without merit, and it is overruled.

Appellant assigns as error number eight the trial court's refusal to grant his motion for discharge which was based on appellant's assertion that he was denied his right to a speedy trial.

Appellant's statutory right to a speedy trial is provided for by R.C. 2945.71. That statute states essentially that one against whom a felony charge is pending, such as appellant, must be brought to trial within two hundred, seventy days after his arrest, except that if the accused is incarcerated on the pending charge, he must be brought to trial within ninety

days. This time limit may be extended only for the reasons set out in R.C. 2945.72. In the event that the accused is not brought to trial in compliance with the provisions of R.C. 2945.71 and R.C. 2945.72, R.C. 2945.73 mandates that he be discharged.

Appellant was arrested and incarcerated on September 25, 1975. He remained in jail until his trial commenced on August 23, 1976. However, since the record shows that only 65 of the days during this time period do not come within the extender provisions of R.C. 2945.72, we do not find that appellant was denied his statutory right to a speedy trial.

The record shows that forty-one days elapsed from September 25, the date of appellant's arrest, until Nov. 5, when the court continued the case until November 10. The situation which led to the continuance began on November 4. On that date the court had ordered the pre-trial hearings closed to the public in order to avoid further publicity in this already sensational case. Certain numbers of the Dayton news media filed a request for a Writ of Prohibition with the court of appeals. As that court had requested the trial court to defer the pretrial hearings until after it had acted on the request for the writ, the court continued the case for five days. We find this extension of time to be a reasonable continuance granted other than upon the accused's own motion. R.C. 2945.72(H).

On November 10, 1975, the record shows that appellant filed numerous motions. These included motions to suppress statements and to suppress physical evidence with requests that the hearing on those motions be held in camera. Other motions filed by appellant at this time were motions for a psychiatric examination, for change of venue, for rescheduling the trial date to accommodate counsel's schedule, and to dismiss the first count of the indictment.

The record also reveals that on November 10 the Dayton newspapers, whose writ to enjoin the trial court from holding pretrial hearings closed to the public was dismissed by the Court of Appeals, filed an original action in prohibition in

the Supreme Court. Consequently, on November 14, pursuant to an order by the Supreme Court enjoining the trial court from holding closed pretrial hearings until it decided the matter and to comply with appellant's request for closed hearings, the trial court ordered these hearing held in abeyance pending the Supreme Court's decision. This continuance by the trial court lasted until December 12, 1975.

We find the record demonstrates that the time period from November 10, 1975 to December 12, 1975, was an extension of time caused by appellant's motions to hold in camera pretrial hearings and the trial court's desire to protect any constitutional right appellant might have in this regard in view of the Supreme Court's position in the matter. Therefore, the record affirmatively indicates that the trial court's continuance was reasonable in light of its necessity or purpose which is sufficient to extend time under R.C. 2945.72(H). *State* v. *Lee* (1976), 48 Ohio St. 2d 208, 357 N.E.2d 1095. Since the time period between November 10 and December 12 is attributable to both a period of delay caused by a motion instituted by appellant and a reasonable continuance granted other than upon the accused's own motion, we find that this time is not chargeable against the state with respect to the running of the statutory time limit within which appellant must have been tried.

On December 12, 1975, the trial court, with the realization that the Supreme Court's decision in the matter was not to be immediately forthcoming, set the time to commence pretrial hearings in open court on December 15, 1975, as it was still enjoined by the Supreme Court from holding closed hearings. At that time defense counsel, with appellant's agreement, requested a continuance until such time as the Supreme Court rendered its decision or counsel elected to go forward. Counsel also protested that appellant was being forced to take a continuance and waive appellant's statutory right to a speedy trial in order to pursue a constitutional right.

First of all, we find that appellant's request for a continuance was a permissible extension of the statutory time period

for bringing him to trial. R.C. 2845.72(E). Although the Supreme Court did not render its decision until June 11, 1976, *State ex rel. Dayton Newspapers* v. *Phillips* (1976), 46 Ohio St. 2d 457, 351 N.E.2d 127, and even though appellant had the option of proceeding at any time during that period, he failed to do so. Moreover, appellant had made a motion for a change of venue at the same time he moved for closed pretrial hearings which the trial court had under advisement. In the event that pretrial publicity would become so intense, as it did, so as to threaten appellant's right to a fair trial in Montgomery County, the Supreme Court has made it clear that change of venue must be the appropriate remedy. *Irvin* v. *Dowd* (1961), 366 U.S. 717, *Rideau* v. *Louisiana* (1963), 373 U.S. 723, *Sheppard* v. *Maxwell* (1966), 384 U.S. 333. We do not find that appellant was forced to waive his statutory right to a speedy trial to protect his right to avoid prejudicial publicity when the alternative of proceeding under a change of venue was still available to him. Therefore we find the time period from December 12, 1975 until June 11, 1976 to be a period of a continuance granted on the accused's own motion and a time period by which the statutory time limit was properly extended.

On July 1, 1976 appellant filed a motion to schedule a trial date and hearing dates for his pending pretrial motions. On July 9, a hearing was had on that motion. At that hearing, the court noted that from the beginning all parties had proceeded on the assumption that there would be separate, sequential trials, and the agreement was that appellant's co-defendant's, Moore's, trial would be held first followed by appellant's. The Moore trial was scheduled to begin the following day and the court had already heard the pretrial motions in the Moore case which were begun on July 5. The court's offer to appellant of a joint trial with Moore was rejected. The record also reflects that simultaneous trials in Summit County were not possible because of the impossibility of finding an available courtroom and judge. Likewise, because of the numerous witnesses and exhibits common to both

trials which would have had to be transported back and forth, to proceed with Moore's and appellant's trials simultaneously in different cities also would have been impossible. Because of the reasons as set forth above, we find the only time chargeable against the state during this period to be the twenty-four days which intervened between the decision of the Ohio Supreme Court and the commencement of Moore's pretrial hearings. From July 5, 1976 until August 9, 1976, the delay occurred as the result of an agreement by counsel acquiesed in by the court, to hold sequential trials, since any other arrangement at the time appellant wished to change this agreement was impossible. We find this to be a reasonable continuance other than upon the accused's own motion. R.C. 2945.72(H). *State* v. *McRae* (1978), 55 Ohio St. 2d 149, 378 N.E.2d 496.

The court set August 9, 1976 as the first date for hearing appellant's pretrial motions, that being approximately one week after the approximate end of the Moore trial. Counsel, with appellant's concurrence, asked that the trial commence on August 16 because of scheduling problems, to which the court agreed. Consequently we find the running of the statute tolled during this time period. R.C. 2945.72(H).

The record reflects that the court heard appellant's motions on August 5. On August 16, the court ordered appellant to give discovery. On August 20, the court ruled on appellant's pretrial motions, and on August 23, appellant's trial commenced. As it appears that any delay during this period was necessitated by reason of actions of and motions made by appellant, the statute did not run. R.C. 2972.45(E).

As a total of only 65 days elapsed under R.C. 2945.71 which were not permissible extensions under R.C. 2945.72, we find that appellant's statutory right to a speedy trial has not been denied.

Nor do we find that, under the balancing test of *Barker* v. *Wingo* (1972), 407 U.S. 514, appellant's constitutional right to a speedy trial has been denied. Our discussion of appel-

lant's statutory right to a speedy trial amply demonstrates the reasonableness of the length of delay and the reasons therefore. It also discusses the impossibility of accomodating appellant's request for an immediate trial in July of 1976, a situation mainly attributable to appellant's acquiescence in trial counsel's agreement to have sequential trials of appellant and his codefendants. We find no prejudice to appellant from the time in which it took for his case to be brought to trial, as evidenced by our previous discussion, the conclusion being simply that appellant was brought to trial as soon as was possible considering all the facts and circumstances. Having found that neither of appellant's rights to a speedy trial, constitutional or statutory, were violated, we overrule appellant's eighth assignment of error.

Appellant's final assignment of error, the ninth, asserts that the trial court committed prejudicial error by applying the Ohio death penalty statute to appellant's case.

The recent decisions of the United States Supreme Court in *Lockett* v. *Ohio* (1978), — U.S. —, 57 L.Ed. 2d 973 and *Bell* v. *Ohio* (1978), — U.S. —, 57 L.Ed.2d 1010 require our affirmance of appellant's ninth assignment of error.

On the basis of our affirmance of appellant's first and ninth assignments of error, appellant's conviction is reversed and the case is remanded to the trial court for further proceedings in harmony with this decision.

PALMER, P. J., and CASTLE, J.

BLACK, J., CONCURS.

BLACK, J., *CONCURRING*:

While I concur in the judgment rendered, I respectfully disagree with the ruling on the fifth assignment of error (*supra*, pages 10 and 11). The majority finds no error in the refusal of the trial court to admit in evidence a certified copy of an entry dated nine years prior to the trial, in which entry a state witness, Estell Dewayne Buck, had been found to be

a psychopathic offender at that earlier date. Two days prior to the trial court's exclusion of the proffered copy, Buck had testified in the instant trial, but being incarcerated for an unrelated offense, he was presumably beyond reasonable recall to the witness stand at the time of the ruling. Defense counsel did not discover, through his independent investigation, the nine-year old record until the day after Buck had testified; the prosecution had not fulfilled its obligation to furnish all of Buck's record in accordance with Crim. R. 16.

Buck's testimony in the instant trial was that the defendant had voluntarily admitted that he had kidnapped and shot the victim, that he received one-half of the ransom payment, and that he had hidden it in Cincinnati. The testimony could not have been more damaging to the defendant.

The trial court in the instant case rejected the certified copy of the psychopathic finding,[1] but "left the door open" by stating it would admit the psychiatric finding if defense counsel produced expert psychiatric evidence about the meaning of the term "psychopathic offender." The term is fully defined in R.C. 2947.24(B), as follows:

> (B) 'Psychopathic offender' means any person who is adjudged to have a psychopathic personality, who exhibits criminal tendencies, and who by reasons [*sic*] therefore is a menace to the public. Psychopathic personality is evidenced by such traits or

---

[1] The court's rejection of the certified copy was not based on the inadequacy of this form of proof or on the absence of any proof of its connection with the witness sought to be impeached. I do not reach any of those questions, because they were not raised by the opposing side. Also, the trial court admitted in evidence a certified copy of a governor's commutation of one of Buck's prior sentences (offered to prove he lied during cross-examination), all without objection on the grounds of inadequacy or absence of in-court identification. I would hold that if the governor's commutation can be used to impeach the witness, so can the judicial determination of his psychopathic personality.

> characteristics inconsistent with the age of such person, as emotional immaturity and instability, impulsive, irresponsive, reckless, and unruly acts, excessively self-centered attitudes, deficient powers of self-discipline, lack of normal capacity to learn from experience, or marked deficiency of moral sense or control.

The definition does not need expert testimony about either its meaning or its significance in evaluating a person's credibility.

A witness' credibility is always a relevant issue. We allow proof of prior convictions to be used to attack a witness' credibility, presumably on the grounds that once a person is convicted of a state or federal offense his regard for the truth is thereafter questionable. We have no rule that limits evidence of prior convictions to those that have occurred in the recent past, or to those crimes reflecting on the person's veracity (as contrasted with crimes indicating aggressiveness or a violent nature). This being the case, the use of judicial findings that a witness has a marked deficiency of moral sense, for instance, should not be subject to greater restrictions. We do not presume that punishment rehabilitates a person so that his prior convictions should not be used against him. Equally, we should not presume that because a psychopathic personality has been released from the hospital for the criminally insane, or because such a person is not hospitalized at the time of testifying, his or her past psychiatric history is not relevant to the perennial issue of credibility.

I would hold that the trial court committed reversible error in excluding evidence of Buck's prior status as a psychopathic offender.

PLEASE NOTE:

The Court has placed of record its own entry in this case on the date of the release of this Decision.

APPENDIX D

IN THE COURT OF APPEALS OF
HAMILTON COUNTY, OHIO
FIRST APPELLATE DISTRICT

Case # C-76900

STATE OF OHIO
Plaintiff-Appellee.

vs.

ALBERT LEE SCOTT, JR.,
Defendant-Appellant.

MOTION

Without prejudicing its right to appeal the reversal of the conviction, pursuant to Ohio Appellate Rule Twenty-Six, the State of Ohio moves that this court reconsider its decision reversing the Defendant's conviction for Kidnapping and for Extortion.

MEMORANDUM IN SUPPORT OF MOTION

In a decision dated November 29, 1978, this court sustained the Defendant's First and Ninth Assignments of Error. The Ninth Assignment of Error was based upon the decision of the United States Supreme Court in *Lockett* v. *Ohio*, 57 L. Ed. 2d 973 (1978), holding unconstitutional the procedures used by Ohio to impose the death penalty. The First Assignment of Error dealt with the answer that the trial judge gave to a question asked by the jury concerning Aggravated Murder.

The Defendant was charged with three separate offenses:

Aggravated Murder, *Ohio Rev. Code Section* 2903.01(B) with specifications under *Ohio Rev. Code Section* 2929.04(A)(3) and *Ohio Rev. Code Section* 2929.04(A)(7); Kidnapping, *Ohio Rev. Code Section* 2905.01(A)(1); and Extortion, *Ohio Rev. Code Section* 2905.11(A)(1) and *Ohio Rev. Code Section* 2905.11(A)(2). He was found guilty of the Aggravated Murder with the specification under *Ohio Rev. Code Section* 2929.04(A)(7); he was also found guilty of the second and third counts of the indictment. He was sentenced consecutively to death for the Aggravated Murder, to from seven to twenty-five years for the Kidnapping and to from three to ten years for the conviction for Extortion.

This court's decision concerning the First Assignment of Error applied only to the Aggravated Murder conviction; in fact the jury question assumed that the defendant was guilty of the crime of Kidnapping. Nothing in the trial judge's answer to the question affected the convictions for Kidnapping and Extortion. Therefore, assuming the premises of this court's reasoning concerning the First Assignment of Error, the defendant's conviction should have been affirmed in part, namely the Kidnapping and the Extortion counts, and reversed in part, namely the Aggravated Murder count.

Respectfully Submitted

LEE C. FALKE,
Prosecuting Attorney for
Montgomery County, Ohio

By /s/ GARY W. CRIM
Assistant Prosecuting Attorney
Appellate Division

[CERTIFICATE OF SERVICE OMITTED]

APPENDIX E

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

NO. C-76900

STATE OF OHIO,

Appellee,

vs.

ALBERT LEE SCOTT, JR.,

Appellant.

ENTRY GRANTING MOTION TO RECONSIDER AND SETTING ASIDE DECISION AND JUDGMENT ENTRY

(Filed December 22, 1978)

This cause came on to be heard upon the motion of the appellee for reconsideration of this Court's Decision and Judgment Entry entered herein on the 29th day of November, 1978, and

The Court being fully advised in the premises finds that said motion is well taken and that the same ought to be and hereby is granted.

WHEREFORE it is the Order of this court that the Decision and Judgment Entry entered herein ought to be and hereby is set aside and held for naught.

APPENDIX F

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

NO. C-76900

STATE OF OHIO,
Plaintiff-Appellee,

vs.

ALBERT LEE SCOTT, JR.,
Defendant-Appellant.

DECISION UPON RECONSIDERATION

(Filed January 24, 1979)

Messrs. Lee C. Faulke, James A. Brogan, and Herbert Creech, Jr., 308 Montgomery County Courts Building, 41 North Perry Street, Dayton, Ohio 45402, for Plaintiff-Appellee,

Messrs. Bieser, Greer and Landis, David C. Greer of counsel, 8 North Main Street, Dayton, Ohio 45202, and

Mr. Joseph P. Buchanen, 2580 Winters Bank Tower, Dayton, Ohio 45402, for Defendant-Appellant.

PER CURIAM.

Upon motion by plaintiff-appellee, this Court has reconsidered its decision reversing defendant-appellant's conviction for kidnapping and for extortion. In that decision, dated November 29, 1978, this Court sustained the defendant's fir.' and

ninth assignments of error. The ninth assignment of error was based upon a decision of the United States Supreme Court in *Lockett* v. *Ohio* (1978), — U.S. —, 57 L. Ed. 2d 973, holding unconstitutional the procedures used by Ohio to impose the death penalty. The first assignment of error concerned an erroneous answer that the trial court gave to a question asked by the jury concerning aggravated murder.

As our remanding of this case to the trial court did involve issues of law concerning only the aggravated murder charge against appellant, we find that our reversal and remand of the total case, which included the convictions of defendant-appellant on the charges of kidnapping and extortion was improvidently made. There being no error in the court below with respect to appellant's convictions for kidnapping and extortion, we affirm those and incorporate the rest of our decision in that case by reference.

Consequently, appellant's assignments of error one and nine are sustained but only as to the charge against him of murder.

This case is therefore affirmed in part and reversed and remanded to the trial court for further proceedings consistent with this opinion.

PALMER, P. J., and CASTLE, J., concur.

BLACK, J., dissents.

BLACK, J., dissenting:

I respectfully dissent from the affirmance of that part of the judgment below wherein appellant was found guilty of kidnapping and extortion. For the reasons set forth in my concurrence in the Decision herein dated November 29, 1978, I would hold that the trial court committed reversible error in excluding evidence of the prior status as a psychopathic offender of one of the prosecution witnesses. Since that witness' testimony was as relevant to the charges of kidnapping and extortion as it was to the murder count, all three convictions should be reversed and remanded for further proceedings.

PLEASE NOTE:

The Court has placed of record its own entry in this case on the date of the release of this Decision.

APPENDIX G

THE STATE OF OHIO, APPELLEE AND APPELLANT, v. SCOTT, APPELLANT AND APPELLEE.

[Cite as State v. Scott (1980), 61 Ohio St. 2d 155.]

Criminal law—Miranda rights waiver—Established, how—Search and seizure—Warrantless search of vehicle—Authorized, when—Witnesses—Impeaching credibility—New trial—Not warranted, when—Aggravated murder

1. An express written or oral statement of waiver of the right to remain silent or the right to counsel is usually strong proof of the validity of that waiver, but is not inevitably either necessary or sufficient to establish waiver. The question is not one of form, but rather whether the defendant in fact knowingly and voluntarily waived the rights delineated in *Miranda* v. *Arizona*, 384 U.S. 436. (*North Carolina* v. *Butler*, 60 L. Ed. 2d 286, 292, followed.)

2. Where a wife has sufficient rights of common access, use and control of a vehicle registered in her husband's name, the wife *herself* has the authority to consent to a search thereof valid as against her husband.

3. In impeaching the credibility of a witness, inquiry into general reputation or character should be restricted to reputation for *truth and veracity*. (*Craig* v. *State*, 5 Ohio St. 605, approved and followed.)

4. The existence of an accused's purpose to kill must be

found by the jury under proper instructions from the trial court and can never be determined by the court as a matter of law.

5. Where a jury could reasonably find against the state on the issue of an aider and abettor's purpose to kill, and find for the state on the remaining elements of felony murder, which themselves would sustain a conviction for involuntary manslaughter, a charge to the jury on involuntary manslaughter is both warranted and required. (*State* v. *Nolton*, 19 Ohio St. 2d 133, 135, approved and followed.)

(Nos. 79-368 and 79-378—Decided February 6, 1980.)

APPEALS from the Court of Appeals for Hamilton County.

In the spring of 1975, Albert Lee Scott, Jr., hereinafter referred to as "appellant," together with Herbert Lee Moore and Willis LeRoy, initiated a plot to kidnap and hold for ransom Lester C. Emoff, a prosperous Dayton businessman and past employer of appellant. Emoff had fired appellant in November 1973, after accusing appellant of stealing from his furniture business. By mid-July 1975, the kidnapping plot consisted of bumping Emoff's automobile from the rear with another vehicle and kidnapping Emoff upon his leaving his automobile to inspect the damage. Emoff was then to be taken to a shack where he would be hidden until the ransom was paid. Though no specific date for the kidnapping was set, an undated ransom note addressed to Emoff's son, Robert Emoff, was prepared by the three participants on a notepad later found in appellant's home.

Appellant knew that Moore and LeRoy possessed guns. In fact appellant had given LeRoy a long barrel .38 caliber revolver. Prior to the kidnapping, Moore expressed his intent to kill Emoff, though appellant maintains their agreement was to release Emoff unharmed once the ransom money was secure. The undated ransom note that appellant assisted in

drafting also contemplated the possibility of Emoff's death. It read as follows:

"Robert Emoff By 12:00 noon tomorrow, you should have in your possession the sum of Four Hundred-Thousand Dollars ($400,000.00) in bills of tens and twenties, money will be checked for unfamiliar markings, Police will not be contacted. Money is for the ransom of Lester Emoff. If these demands are not carried out to the letter, Lester Emoff and car with tag 866-pe will be destroyed with dynamite along with all three stories and your warehouse.

"At 12:00 noon tomorrow you are to leave your house with the money in the green car tag #7947-nv and proceed to the Sohio station on Riverview and Philadelphia Dr. Inside the station you will receive further instructions at exactly 12:05 by phone. You will be timed. 30 MPH."

Appellant testified that in late July 1975, Moore and LeRoy informed him of their recent failure to accomplish the kidnapping, and of their skepticism that it could ever be accomplished. Appellant further testified that at this point he considered the plot abandoned. Evidence attempting to refute appellant's abandonment, however, was also presented. First, appellant admitted having at least three or four meetings with Moore and LeRoy in August and September. Second, appellant's driver's license served as identification for a September 12th purchase of .38 caliber special cartridges ammunition.[1] Third, there was testimony that on the day before Emoff's kidnapping, September 22, Moore and LeRoy visited appellant's home.

On the evening of September 23, 1975, Moore and LeRoy kidnapped Emoff, and brought Emoff in his automobile to appellant's home. Appellant testified that he asked LeRoy why LeRoy and Moore had brought Emoff to his home, and further testified that he then disaffirmed any involvement in

---

[1] Purchases of .38 caliber ammunition are recorded as required by federal law.

the kidnapping. Shortly thereafter, Moore and LeRoy, together with Emoff, left appellant's home only to return, without Emoff, early the next morning, September 24, to discuss with appellant plans for securing the ransom. Consistent with his assertion that he had earlier abandoned the kidnapping, appellant testified that only at this later date was he persuaded to reassociate with the plot.

The details of the September 24, 1975, pick-up of the ransom are these. Appellant took a position near the spot where the ransom was to be dropped off by Emoff's son, Robert, while LeRoy directed Robert to that drop-off spot by telephoning him at the service station referred to in the ransom note. After Robert dropped off the ransom of $400,000 at approximately noontime, appellant picked up the money and delivered it to a location from which Moore and LeRoy apparently were then to take it to a "fence" in Columbus to be "cleaned." Before delivering the money, appellant took an uncertain number of twenty-dollar bills later recovered from various Detroit stores where they had been spent by appellant and his wife that afternoon.[2]

The next afternoon, September 25, armed with a search warrant, law enforcement officials began a search of appellant's then vacant home. Appellant and his wife returned home during this search at which time a search of appellant recovered one of the twenty-dollar ransom bills. Appellant and his wife then agreed to accompany law enforcement officials to the Federal Bureau of Investigation offices in Dayton for further questioning. After separate interrogations of appellant and his wife, appellant was arrested.

After appellant's appearance before a judge, a plea bargain was reached between law enforcement officials and appellant and his attorneys. In return for information helpful in locating Emoff, the officials promised to limit both the

---

[2] The ransom bills were traced by the F.B.I., whom Robert Emoff had contacted after receiving the ransom note.

prosecutorial use of the proffered information and the offenses for which appellant might be charged. Appellant testified that by this plea bargain, the officials unconditionally agreed, *inter alia*, not to charge him with aggravated murder. The officials and appellant's attorneys, who were not trial counsel, disagreed, however, testifying that the plea bargain was conditioned upon appellant's passing a polygraph test. Shortly thereafter, appellant admitted involvement in the kidnapping and led the police to Emoff's body.[3]

The Montgomery County Grand Jury indicted appellant on one count of aggravated murder while committing the offense of kidnapping under R. C. 2903.01(B), with two specifications under R. C. 2929.04(A)(3) and R. C. 2929.04 (A)(7). In addition, appellant was charged with one count of kidnapping under R. C. 2905.01(A)(1), and with one count of extortion under either R. C. 2905.11(A)(1) or (2). Appellant pleaded not guilty on all counts. Due to extensive pre-trial publicity, venue was changed to Hamilton County pursuant to appellant's motion. A jury convicted appellant on all counts, including one specification. After finding the mitigating factors listed in R. C. 2929.04(B) inapplicable, the trial court imposed the death sentence.

On appeal, the Court of Appeals affirmed the kidnapping and extortion convictions but reversed and remanded the conviction for aggravated murder.[4] In connection with this reversal and remand, the Court of Appeals held that it was

---

[3] Six bullets recovered from Emoff's body established that he had been shot with two .38 caliber handguns. Bullets of the same type were later found at the residences of Moore's sister and LeRoy's mother. LeRoy's hat was found near Emoff's body. There was evidence that a diamond ring worn by Emoff had earlier been in Moore's possession. One of the murder weapons was still in Moore's and LeRoy's possession a few days after the murder.

[4] The Court of Appeals reversed the trial court's imposition of a death sentence based upon *Lockett* v. *Ohio* (1978), 438 U.S. 586 (holding unconstitutional the procedures used by Ohio to impose the death penalty).

prejudicial error for the trial court, over appellant's objection, to answer affirmatively a jury question to the effect that a conviction for kidnapping, without more, was sufficient to support a conviction for aiding and abetting a murder.

The cause is now before this court pursuant to the allowance of Scott's motion for leave to appeal in case No. 79-368, and the state's motion for leave to appeal in case No. 79-378.

Mr. David C. Greer and *Mr. Joseph P. Buchanan*, for Albert Lee Scott, Jr.

Mr. Lee C. Falke, prosecuting attorney, and *Mr. Gary W. Crim*, for the state of Ohio.

WILLIAM B. BROWN, J. Appellant Scott herein challenges the Court of Appeals' affirmance of the kidnapping and extortion convictions, and its reversal and remand of the aggravated murder conviction. The state has separately appealed this reversal and remand. We consolidate these appeals and discuss appellant's objections first.

I.

Appellant contends, in his first proposition of law, that he is entitled to a discharge due to the state's failure to comply with the speedy trial provisions, R. C. 2945.71 *et seq.* As herein applied, the speedy trial provisions effectively require that a felon incarcerated on a pending charge must be discharged upon his motion if not brought to trial within 90 days of arrest, unless the period of delay in excess of 90 days can be explained in terms of the excusing conditions included in R. C. 2945.72.[5] Appellant, in effect, contends (1) that the

---

[5] In pertinent part, R. C. 2945.71 provides:

"(C) A person against whom a charge of felony is pending:

"• • •

"(2) Shall be brought to trial within two hundred seventy days after his arrest;

"(D) For the purpose of computing time • • •, each day during

only explanation for a 49-day delay between July 5, 1976, and the commencement of trial, August 23, 1976, is "convenience to the court or to the prosecution", (2) that such convenience is not a condition included in R. C. 2945.72; and (3) that this 49-day delay when added to an earlier 65-day delay as to which there is no dispute impermissibly results in a period of unexcused pre-trial incarceration longer than 90 days. Hence, appellant concludes that he is entitled to a discharge.

Appellant's argument fails because the 49-day delay can be explained in terms of the excusing conditions included in R. C. 2945.72. From the outset, all parties assumed that Moore and appellant would have separate and sequential trials, with Moore's trial occurring first. Appellant in fact rejected an offer to be jointly tried. Sequential trials were agreed to and planned in recognition of the problems that would be encountered in securing two courtrooms and judges in the same location, and in transporting and allocating numerous common witnesses and exhibits between the courtrooms. Moore's trial took place from July 5 to August 9. Appellant made pre-trial motions prior to August 9, which were

---

which the accused is held in jail in lieu of bail on the pending charge shall be counted as three days."

In pertinent part, R. C. 2945.73 provides:

"(B) Upon motion made at or prior to the commencement of trial, a person charged with an offense shall be discharged if he is not brought to trial within the time required by sections 2945.71 or 2945.72 of the Revised Code."

In pertinent part, R. C. 2945.72 provides:

"The time within which an accused must be brought to trial • • • may be extended only by the following:

"• • •

"(E) Any period of delay necessitated by reason of a plea in bar or abatement, motion, proceeding or action made or instituted by the accused;

"• • •

"(H) The period of any continuance granted on accused's own motion, and the period of any reasonable continuance granted other than upon the accused's own motion."

ruled on by the trial court on August 20. He was ordered to give discovery on August 16, and his trial commenced on August 23. We thus determine the delay from July 5 to August 9 to be a reasonable continuance granted other than upon appellant's own motion. R. C. 2945.72(H). Alternatively, since appellant refused an offer to be tried jointly, we determine this same delay to be necessitated by reason of a motion or action of appellant. R. C. 2945.72(E). We also determine the delay from August 9 to the commencement of appellant's trial, August 23, to be a delay necessitated by reason of appellant's own pretrial motions. R. C. 2945.72(E). Therefore, pursuant to R. C. 2945.72, this 49-day delay is not to be counted against the 90-day limitation, and appellant is not entitled to a discharge.

II.

Appellant, in his eighth proposition of law, argues that certain incriminating statements made by him to F.B.I. agents after he had been taken to the F.B.I. office in Dayton were improperly admitted because his waiver of rights was involuntary.

F.B.I. agents testified (1) that an agent read appellant his *Miranda* rights, and that appellant read the bureau's "Advice of Rights" form; (2) that appellant acknowledged that he understood his rights and, though he refused to sign a waiver form, he agreed to answer questions; and (3) that appellant never requested counsel. Appellant took issue with the above account, testifying that his requests for counsel were denied.

The record supports the trial court's determination that the statements were made after appellant had knowingly and voluntarily waived his *Miranda* rights. Sitting as trier of fact at the suppression hearing, the trial court resolved the above conflict in testimony by reasonably choosing to adopt the agents' account. See *State* v. *DeHass* (1967), 10 Ohio St. 2d 230. Moreover, appellant's refusal to sign a waiver form is

not conclusive that his waiver was involuntary. Faced with a similar refusal, the United States Supreme Court recently held that "[a]n express written or oral statement of waiver of the right to remain silent or of the right to counsel * * * is not inevitably either necessary or sufficient to establish waiver. The question is not one of form, but rather whether the defendant in fact knowingly and voluntarily waived the rights delineated in the *Miranda* case." *North Carolina* v. *Butler* (1979), 60 L. Ed. 2d 286, 292. Thus, the trial court did not err in admitting the statements.

III.

In his seventh proposition of law, appellant argues that both the charge of aiding and abetting Emoff's murder and the evidentiary use of certain incriminating information were proscribed by a plea bargain reached shortly after the arrival of appellant's attorneys. Contrary to the state's contention and to the finding of the trial court, appellant asserts that the plea bargain was not conditioned upon his passing a later polygraph examination supporting his truthfulness as to his involvement in Emoff's kidnapping and as to his then present knowledge of Emoff's whereabouts.

The record supports the trial court's interpretation of the plea bargain. Law enforcement officials and appellant's attorneys, who were not trial counsel, testified at the suppression hearing that appellant was aware of and agreed to the conditional nature of the plea bargain, and the trial court reasonably so found. See *State* v. *DeHass, supra.* Thus, appellant's argument is without merit.

IV.

Appellant, in his fifth proposition of law, challenges a warrantless search of appellant's automobile based solely on his wife's signing a consent to search form and her surrendering the keys to law enforcement officials. Appellant argues that the search was illegal because he was the registered owner

of the automobile and never delegated to his wife the authority to consent to a warrantless search. In support, appellant cites *State* v. *Bernius* (1964), 177 Ohio St. 155, which held that a search of an automobile based solely on the consent of a casual borrower is unreasonable as against the owner. The state counters that appellant's wife could *herself* authorize the search since, as appellant admitted, she had the right to use and control the vehicle. For this proposition, the state relies on *State* v. *McCarthy* (1971), 26 Ohio St. 2d 87, which held that the consent of a wife to search a married couple's common home is reasonable as against her husband.

We determine *State* v. *McCarthy* controlling and hold that the search was valid. Based on her rights of common access, control and use of the automobile, appellant's wife *herself* could authorize a search thereof valid as against appellant. *State* v. *Bernius* is not on point because appellant's wife was neither a casual borrower, nor were her rights to use or control the automobile circumscribed in any significant way. See *United States* v. *Matlock* (1974), 415 U.S. 164; *Roberts* v. *United States* (C.A. 8, 1964), 332 F. 2d 892.

V.

In his second proposition of law, appellant complains that the trial court committed reversible error by refusing to admit, on the issue of credibility, a certified copy of a nine-year old judicial disposition finding a state witness to be a statutory psychopathic offender.[6]

---

[6] R. C. 2947.24(B) provides:

" 'Psychopathic offender' means any person who is adjudged to have a psychopathic personality, who exhibits criminal tendencies, and who by reason thereof is a menace to the public. Psychopathic personality is evidenced by such traits or characteristics inconsistent with the age of such person, as emotional immaturity and instability, impulsive, irresponsive, reckless, and unruly acts, excessively self-centered attitudes, deficient powers of self-discipline, lack of normal capacity to learn from experience, or marked deficiency of moral sense or control."

Initially, the trial court gave appellant the option, which was not exercised, of introducing expert testimony showing the connection between psychopathic offender status and credibility. Absent this expert testimony, the trial court determined that it would be unfair to admit the finding because its entry was nine years old, and because there was no showing that the witness would still qualify as a psychopathic offender, as evidenced by his release from a state hospital, and by his current incarceration, instead of hospitalization.

The trial court did not abuse its discretion in refusing to admit the certified copy of the finding. Given the broadness of the statutory definition, the finding's relevancy on the issue of the witness' sensory incapacity was tenuous. Moreover, the statutory classification would have impeached the witness' general moral character, rather than impeaching, more narrowly, his reputation for *truth and veracity*. *Craig* v. *State* (1854), 5 Ohio St. 605. As such, the trial court would have been within its discretion if it had unconditionally refused to admit the finding. *A fortiori*, the trial court did not abuse its discretion by conditioning the finding's admissibility on the presentation of the above expert testimony. Finally, even if the judicial finding were otherwise admissible, the trial court could have reasonably concluded that at the time of testimony the nine-year old finding was too remote to be relevant. *Radke* v. *State* (1923), 107 Ohio St. 399. See McCormick on Evidence (2 Ed. 1972), at page 92.

VI.

Appellant's sixth proposition of law is that the trial court erred prejudicially in refusing to grant appellant's motion for a new trial based on comments made by a state official in the presence of certain unsequestered jurors concerning the criminal justice system.

The statements were made during a trial recess and were brought to the attention of the trial court by a juror. The trial court immediately informed counsel and conducted a

voir dire of each juror. Most jurors had no recollection of the comments. With one exception, the few who did recollect them said the comments were unrelated to appellant's trial and would have no influence upon them. The one juror who said that the comments were related to appellant's trial could describe neither their general subject matter nor their details, and further admitted merely overhearing them. At the close of *voir dire*, the trial court overruled appellant's motion for a new trial on the ground that those jurors who heard the comments were not influenced by them. Later, upon interrogation by the court, the commenting state official testified that his comments were made to one juror, that they were confined to general comments about probation and parole, and that they were unrelated to appellant's trial. At the end of this testimony, the trial court again overruled appellant's renewed motion.

The trial court did not abuse its discretion in overruling appellant's motion for a new trial. Since the trial court's separate *voir dire* of each juror revealed the state official's comments to be unrelated to appellant's trial, no issue of presumptive prejudice was present. See *Remmer* v. *United States* (1954), 347 U.S. 227. Moreover, the trial court's finding of no actual prejudice was supported by the jurors' individual assertions on *voir dire* that they would not be influenced by the comments. Thus, the trial court properly overruled appellant's new trial motion.

VII.

Appellant, in his third proposition of law, argues that the Court of Appeals should have unconditionally reversed and not remanded appellant's aggravated murder conviction because the record did not include an evidentiary basis which would support a jury finding that appellant purposely aided and abetted Emoff's murder.

The complicity statute, R.C. 2923.03, in relevant part, reads: "(A) No person, acting with the kind of culpability re-

quired for the commission of an offense, shall do any of the following:

"• • •

"(2) Aid or abet another in committing the offense."

The aggravated murder statute, R.C. 2903.01, in relevant part, reads:

"(B) No person shall purposely cause the death of another while committing or attempting to commit • • • kidnapping • • •."

Based upon these sections, appellant argues that to convict him for aggravated murder the state needed to prove his purpose to cause death, and that such purpose could not legally be inferred from the evidence presented.

Appellant's argument is without merit. A jury can infer an aider and abettor's purpose to kill where the facts show that the participants in a felony entered into a common design and *either* the aider or abettor knew that an inherently dangerous instrumentality was to be employed to accomplish the felony *or* the felony and the manner of its accomplishment would be reasonably likely to produce death. *State* v. *Lockett* (1976), 49 Ohio St. 2d 48, paragraphs three and four of the syllabus. Since the state presented evidence showing appellant's complicity, his awareness that handguns were to be employed to accomplish the kidnapping, and also that the kidnapping was reasonably likely to produce Emoff's death, a sufficient evidentiary basis was present. Accord, *State* v. *Clark* (1978), 55 Ohio St. 2d 257.

VIII.

In its separate appeal the state has challenged the Court of Appeals' reversal of the aggravated murder conviction. The Court of Appeals reversed this conviction solely because it determined that the effect of the trial court's affirmative answer to a jury question "was to remove the question from the jury of whether the victim's death was reasonably foreseeable as a natural and probable consequence of kidnapping

• • • [and remanded because] • • • appellant was entitled to whatever benefit such instruction might give him."

The jury presented the trial court with the following question:

"According to the *law* if a defendant is guilty of kidnapping and the victim is never released alive even though the defendant had no knowledge of nor participation in the murder, by reason of being implicated in the kidnapping is he also guilty of aiding and abetting the murder?"

Over appellant's objection, the trial court answered that "[s]uch a defendant is also guilty of aiding and abetting the murder."

The state argues that the trial court's affirmative answer correctly "instructed the jury as to the legal effect of facts concerning the relationship between the kidnappers and the murder *in this case* • • •." We disagree. The trial court's affirmative answer would have been correct only if Ohio adhered to the strict felony murder rule. That is, appellant would be "guilty of aiding and abetting the murder • • • [solely] by reason of being implicated in the kidnapping • • •" only if the *mens rea* requirement for murder could be supplied by the mental element of the underlying kidnapping.

Ohio, however, does not follow the strict felony murder rule. "[P]urpose to kill is an essential element of the crime of first degree murder in this state." *State* v. *Lockett, supra,* at pages 58-59; *Robbins* v. *State* (1857), 8 Ohio St. 131; *State* v. *Farmer* (1951), 156 Ohio St. 214. Accordingly, paragraphs three and four of the syllabus in *Lockett* describe the factual basis from which a jury could *infer* appellant's purpose to kill, as required by the aggravated murder statute. See Part VII, *supra.* See, also, *State* v. *Johnson* (1978), 56 Ohio St. 2d 35, 38. In effect, the trial court's affirmative answer to the jury question improperly relieved the state of its duty to prove appellant's purpose to kill beyond a reasonable doubt. See *In re Winship* (1970), 397 U.S. 358, 364. The state's appeal is therefore without merit.

IX.

Appellant's fourth proposition of law argues that it was prejudicial error for the trial court to refuse to instruct the jury on the lesser-included offense of involuntary manslaughter. The Court of appeals sustained this refusal, determining that "appellant's defense • • • [did] not furnish an evidentiary basis for an instruction on • • • involuntary manslaughter."

The Court of appeals erred in sustaining the trial court's refusal to instruct the jury on involuntary manslaughter. Involuntary manslaughter would be an offense for which the jury could convict appellant if appellant convinced the jury that he lacked the purpose to kill required by the aggravated murder statute.

R. C. 2903.04(A) defines involuntary manslaughter as follows:

"No person shall cause the death of another as a proximate result of the offender's committing or attempting to commit a felony."

Appellant was convicted of kidnapping, a felony. If on remand, the jury were to find that appellant lacked the purpose to kill necessary to sustain a conviction for aiding and abetting the aggravated murder, an involuntary manslaughter conviction would be possible since the jury could conclude that the murder was nevertheless a "proximate result of [appellant's] committing • • • a felony." See *State* v. *Nolton* (1969), 19 Ohio St. 2d 133, 135; *Cf. State* v. *Hill* (1967), 12 Ohio St. 2d 88, 91-92, and paragraph four of the syllabus.

Accordingly, to this limited extent, the judgment of the Court of Appeals is reversed. On remand, the trial court must additionally instruct the jury on involuntary manslaughter. In all other respects, the judgment of the Court of Appeals is affirmed.

Judgment affirmed in part
and reversed in part.

CELEBREZZE, C. J., HERBERT, P. BROWN, SWEENEY, LOCHER and HOLMES, JJ., concur.

APPENDIX H

IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO

NOW IN THE COMMON PLEAS COURT OF HAMILTON COUNTY, OHIO
UPON CHANGE OF VENUE

Montgomery County, Ohio
CASE NO. 75-CR-1359
Hamilton County, Ohio
CASE NO. B-3762363

STATE OF OHIO,

Plaintiff,

v.

ALBERT LEE SCOTT, JR.,

Defendant.

MOTION TO DISMISS

(Filed August 18, 1980)

Now comes the defendant, Albert Lee Scott, Jr., by his attorneys, and moves the Court for an order dismissing the indictment of aggravated murder while committing the offense of kidnapping under Section 2903.01(B) for the reason that the State's prosecution of said indictment violates the defendant's right against double jeopardy secured to him by the Fifth and Fourteenth Amendments to the Constitution

of the United States. This Motion is supported by the memorandum below.

.....

David C. Greer, Trial Attorney
600 First National Bank Building
Dayton, Ohio 45402
Telephone: (513) 223-3277

Joseph P. Buchanan, Trial Attorney
2580 Winters Bank Tower
Dayton, Ohio 45402
Telephone: (513) 223-6211

Attorneys for Defendant

MEMORANDUM

This cause is now before the Court upon remand by the Ohio Supreme Court. Trial by jury is scheduled to commence September 3, 1980. Defendant submits that the decision of the United States Supreme Court in *Illinois* v. *Vitale*, 65 L.Ed.2d 228, promulgated July 29, 1980 requires dismissal of the indictment.

The Montgomery County Grand Jury indicted defendant on one count of aggravated murder while committing the offense of kidnapping under R.C. 2903.01(B), with two specifications under R.C. 2929.04(A)(3) and R.C. 2929.04(A)(7), one count of kidnapping under R.C. 2905.01(A)(1) and with one count of extortion under either R.C. 2905.11(A)(1) or (2). A jury convicted defendant on all counts except the specification under R.C. 2929.04(A)(3) which the jury found the defendant not guilty. On appeal, the Court of Appeals affirmed the kidnapping and extortion convictions but reversed and remanded the conviction for aggravated murder. The Court of Appeals held that it was prejudicial error for the trial court, over defendant's objection, to answer affirmatively a jury question to the effect that a conviction for kidnapping, without more, was sufficient to support a conviction

for aiding and abetting a murder. Both the defendant and the State appealed to the Ohio Supreme Court. The Ohio Supreme Court found that the State's appeal was without merit, and reversed the judgment of the Court of Appeals to the extent that on remand the trial court must additionally instruct the jury on involuntary manslaughter.

One of the provisions of the Fifth Amendment to the Constitution declares that no person shall ". . . be subject for the same offense to be twice put in jeopardy of life or limb." This constitutional guarantee is applicable to the States through the Due Process Clause of the Fourteenth Amendment. *Benton* v. *Maryland*, 23 L.Ed.2d 707 (1969). Among other things, it protects against a second prosecution for the same offense after conviction. *Illinois* v. *Vitale, supra.* In the instant case the defendant was tried and convicted of the crime of kidnapping. He now faces a second prosecution for the alleged crime of aggravated murder under R.C. 2903.01 (B), which provides, in pertinent part, that "no person shall purposely cause the death of another while committing . . . kidnapping . . .". There are two essential elements to the crime under R.C. 2903.01(B). One is that the defendant "purposely cause the death of another" and the other is "while committing kidnapping." However, defendant Scott has already been tried and convicted of the crime of kidnapping. It is abundantly clear that the crime of kidnapping requires no proof beyond that which is required for conviction of the greater crime under R.C. 2903.01(B); i.e., "purposely cause the death of another while committing kidnapping." As the Court stated in *Brown* v. *Ohio*, 53 L.Ed.2d 187, 199 (1977):

> "The greater offense is therefore by definition the 'same' for purposes of double jeopardy as any lesser offense included in it."

Where a person is convicted of felony murder arising from an armed robbery, he cannot be later tried and convicted of the crime robbery from which the felony murder arose. *Harris*

v. *Oklahoma*, 53 L.Ed.2d 1054 (1977). The reverse is also true; that is, a person who is convicted of the felony, in the case at bar, kidnapping, cannot be later tried for the felony murder arising from kidnapping. The United States Supreme Court has made this perfectly clear in the recent case of *Illinois* v. *Vitale, supra*, at page 238:

> "In *Harris*, we held, without dissent, that a defendant's conviction for felony murder based on a killing in the course of an armed robbery barred a subsequent prosecution against the same defendant for the robbery. . . .we treated a killing in the course of a robbery as itself a separate statutory offense, and the robbery as a species of lesser-included offense. The State conceded that the robbery for which petitioner had been indicted was in fact the underlying felony, all elements of which had been proved in the murder prosecution. We held the subsequent robbery prosecution barred under the Double Jeopardy Clause, since under *In re Nielsen*, 131 U.S. 176, 33 L.Ed. 118, 9 S.Ct. 672 (1889), a person who has been convicted of a crime having several elements included in it may not subsequently be tried for a lesser-included offense — an offense consisting solely of one or more of the elements of the crime for which he has already been convicted. Under *Brown*, the reverse is also true; a conviction on a lesser-included offense bars subsequent trial on the greater offense."

It is anticipated that the State will claim that since defendant obtained the reversal of the aggravated murder conviction by his own appeal, he can again be tried for this offense. *United States* v. *Ball*, 41 L.Ed. 300. But defendant's claim of former jeopardy is not based on the conviction of aggravated murder which was rendered by the jury, but rather on the conviction of kidnapping, and since kidnapping is an essential element of the crime for which defendant is charged the Fifth Amendment bars the prosecution of the aggravated murder charge. Furthermore, it is clear from the question

propounded to the trial court by the jury in the first trial of this cause, that had the jury been properly instructed instead of given what was tantamount to a directed verdict, there would have been no aggravated murder conviction in the first place. Defendant's successful appeal of the aggravated murder conviction neither waived his constitutional defense of former jeopardy nor prolonged his original jeopardy. See *Green* v. *United States*, 2 L.Ed.2d 199 (1957) at pages 206, 207.

For the foregoing reasons, the indictment against this defendant must be dismissed.

Respectfully submitted,

.....

David C. Greer, Trial Attorney
600 First National Bank Building
Dayton, Ohio 45402
Telephone: (513) 223-3277

Joseph P. Buchanan, Trial Attorney
2580 Winters Bank Tower
Dayton, Ohio 45402
Telephone: (513) 223-6211

Attorneys for Defendant

[PROOF OF SERVICE OMITTED]

APPENDIX I

IN THE COMMON PLEAS COURT OF
MONTGOMERY COUNTY, OHIO

NOW IN THE COMMON PLEAS COURT OF
HAMILTON COUNTY, OHIO
UPON CHANGE OF VENUE

Montgomery County, Ohio – Case No. 75-CR-1359

Hamilton County, Ohio – Case No. B-3762363

STATE OF OHIO,

Plaintiff,

vs.

ALBERT LEE SCOTT, JR.,

Defendant.

ORDER

(Filed August 28, 1980)

YEAZEL, J.

Defendant's motion to dismiss is overruled.

.....

Judge

WALTER DODSWORTH,
On behalf of the State;

DAVID C. GREER,
JOSEPH P. BUCHANAN,
On behalf of the defendant.

APPENDIX J

THE STATE OF OHIO, HAMILTON COUNTY
COURT OF COMMON PLEAS

No. B762363

THE STATE OF OHIO

vs.

ALBERT LEE SCOTT, JR.

JURY DISAGREED JURY DISCHARGED

This day came the parties by their attorneys, also came the Jury heretofore impaneled and sworn, and retired to their room in charge of the Bailiff for further deliberations.

And now comes the said Jury into open Court and state that it is unable to agree upon a Verdict, and the Court finds that there is no probability of such Jurors agreeing upon a Verdict.

WHEREUPON, the said Jury is discharged by the Court from any further consideration of this case, and the case is hereby continued.

APPENDIX K

IN THE COMMON PLEAS COURT OF
MONTGOMERY COUNTY, OHIO

NOW IN THE COMMON PLEAS COURT OF
HAMILTON COUNTY, OHIO
UPON CHANGE OF VENUE

Montgomery County, Ohio – Case No. 75-CR-1359

Hamilton County, Ohio – Case No. B-3762363

STATE OF OHIO,

Plaintiff,

vs.

ALBERT LEE SCOTT, JR.,

Defendant.

(Judge Yeazel)

MOTION FOR ACQUITTAL

(Filed October 14, 1980)

Now comes the defendant, Albert Lee Scott, Jr., by and through his attorneys, and moves this Court, pursuant to Crim. R. 29(C), for a judgment of acquittal for the reasons stated in the attached Memorandum.

/s/ DAVID C. GREER
Trial Attorney
600 First National Bank Building
Dayton, Ohio 45402
Telephone: (513) 223-3277

Joseph P. Buchanan, Trial Attorney
2580 Winters Bank Tower
Dayton, Ohio 45423
Telephone: (513) 223-6211

Attorneys for Defendant

MEMORANDUM

The defendant incorporates by reference the arguments presented in his Motion to Dismiss, which was filed in this case on August 19, 1980, and in his Reply Memorandum in Support of said Motion, which was filed on August 27, 1980.

The United States Supreme Court has, in recent decisions, made it clear that "separate statutory crimes need not be identical – either in constituent elements or in actual proof – in order to be the same within the meaning of the constitutional prohibition" contained in the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution. *Brown* v. *Ohio*, 432 U.S. 161, at 164 (1977). This constitutional right serves "a constitutional policy of finality for the defendant's benefit." *United States* v. *Jorn*, 400 U.S. 470, at 479 (1971). This policy "protects the accused from . . . attempts to secure additional punishment after a prior conviction and sentence." *Brown, supra*, at 165-166.

The established test for determining whether two offenses are sufficiently distinguishable to permit the imposition of cumulative punishment was stated in *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932):

> "The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory

provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not . . ." *Brown, supra,* at 166.

In applying this test, a court must look to the elements of the two statutory offenses to determine whether or not they are the same offense for double jeopardy purposes. *Brown, supra, State* v. *Thomas,* 61 Ohio St.2d 254, at 259, 400 N.E.2d 897, 15 Ohio Op.3d 262 (1980). The elements of the offense of kidnapping, pursuant to R.C. Section 2905.01(A)(1) are: (1) by force, threat or deception; (2) (a) removing a person from the place he is found, or (b) restraining a person of his liberty; (3) with purpose to hold for ransom, or as a shield or hostage; and (4) venue. The elements of the offense of aggravated murder as they relate to this case, pursuant to R.C. Section 2903.01(B) are: (1) purposely causing another's death; (2) while committing, attempting to commit, or fleeing immediately after committing or attempting to commit; (3) kidnapping; and (4) venue. It is clear that these two statutory offenses do not require proof of an additional fact which the other does not. As was noted in the *Brown* case, this "is invariably true of a greater and lesser included offense." (at 168). All of the elements of the offense of kidnapping must be proven by the State in its case for aggravated murder against this defendant. There were no additional elements which the State had to prove in its kidnapping case against this defendant. Therefore, the two offenses of aggravated murder and kidnapping are the same for purposes of invoking the protections of the Double Jeopardy Clause in this case due to the fact that neither of these statutory offenses requires proof of any fact that the other does not. For this reason, "the State is not permitted to seek multiple punishment. Again, if the two offenses are the same under the *Blockburger* test for purposes of barring multiple sentences at a single trial, they necessarily will be the same for purposes of barring multiple prosecutions. *Brown, supra.*" *Thomas, supra,* at 259.

The United States Supreme Court has held that "when, as here, conviction of a greater crime, murder, cannot be had without conviction of the lesser crime, robbery with firearms, the Double Jeopardy Clause bars prosecution for the lesser crime after conviction of the greater one." *Harris* v. *Oklahoma*, 433 U.S. 682, at 682 (1977). "Although in this formulaiton the conviction of the greater precedes the conviction of the lesser, the opinion makes it clear that the sequence is immaterial." *Brown, supra*, at 168. Thus, applying this rule of *Harris* and *Brown* to the case at bar, it is clear that when, as here, conviction of a greater crime, aggravated murder, cannot be had without conviction of the lesser crime, kidnapping, the Double Jeopardy clause bars prosecution for the greater crime after conviction of the lesser crime.

The law is clear that in a situation such as exists in this case, the Double Jeopardy Clause bars prosecution for the greater offense of aggravated murder after a conviction for the lesser offense of kidnapping has been obtained. Therefore, the State of Ohio is barred by the Double Jeopardy Clause from prosecuting Albert Lee Scott, Jr., on the aggravated murder charge.

The State contended in its Response to the defendant's Motion to Dismiss that "the defendant is not in 'double jeopardy', but is in 'continuing jeopardy.'" (at 1). In support of this proposition, the State cited a Fifth Circuit case which made reference to *Price* v. *Georgia*, 398 U.S. 323 (1970).

The "continuing jeopardy theory" upon which the State relies was first articulated by Justice Holmes in his dissenting opinion in *Kepner* v. *United States*, 195 U.S. 100 (1904). Justice Holmes postulated: "The jeopardy is one continuing jeopardy, from its beginning to the end of the cause. Everybody agrees that the principal in its origin was a rule forbidding a trial in a new and independent case where a man already had been tried once. But there is no rule that a man may not be tried twice in the same case." *Kepner, supra*, at 134. The "continuing jeopardy" theory of Justice

Holmes has never been adopted by the United States Supreme Court as the law of the land. In fact, this theory has been expressly rejected by the United States Supreme Court in two recent cases. "The 'continuing jeopardy' concept that was articulated by Mr. Justice Holmes . . . has never been adopted by a majority of this Court." *United States* v. *Jenkins*, 420 U.S. 358, at 369 (1975). "We have rejected this position in the past, and we continue to . . ." *United States* v. *Wilson*, 420 U.S. 332, at 352 (1975).

The State cannot circumvent the clear mandate of the Double Jeopardy Clause which is contained in the *Brown* and *Harris* cases by invoking a theory of the law of double jeopardy which has never been accepted by the United States Supreme Court.

The State also argued in its Memorandum that the defendant waived his double jeopardy rights in this case by appealing his convictions. This theory has also been expressly rejected by the United States Supreme Court on several occasions. " 'Waiver' is a vague term used for a great variety of purposes, good and bad, in the law. In any normal sense, however, it connotes some kind of voluntary knowing relinquishment of a right . . . it is wholly fictional to say that he 'chooses' to forego his constitutional defense of former jeopardy . . ." *Green* v. *United States*, 355 U.S. 184, at 191-192 (1957). "A majority of the Court rejected the argument that by appealing the conviction of second degree murder the petitioner had 'waived' his plea of former jeopardy with regard to the charge of first degree murder." *Price* v. *Georgia*, *supra*, at 328. "This Court has implicitly rejected the contention that the permissibility of a retrial following a mistrial or a reversal of a conviction on appeal depends on a knowing, voluntary, and intelligent waiver of a constitutional right . . ." *United States* v. *Dinitz*, 424 U.S. 600, at 609 n.11 (1976).

Once again, the State's waiver argument is based upon a theory of the law of double jeopardy which has been expressly rejected by the United States Supreme Court.

It is entirely inaccurate to argue that the defendant now faces a second trial on the aggravated murder charge "due to *his* actions, not those of the State." The facts are that as a result of the defendant's appeal, the Court of Appeals, on November 29, 1978, reversed the trial court's judgment and remanded the case for a new trial on *all* counts. Had this court order been complied with, the defendant would have been retried on both the aggravated murder charge and the kidnapping charge. There would have been no double jeopardy problem due to the fact that there would have been no prior conviction on the lesser included offense, kidnapping, which would bar retrial on the greater offense, aggravated murder.

However, the State filed a Motion for Reconsideration with the Court of Appeals. On January 24, 1979, the Court of Appeals accepted the State's arguments and reinstated the convictions for kidnapping and extortion. The Ohio Supreme Court let stand the Court of Appeals' reversal and affirmances.

As a result of the State's Motion for Reconsideration, this Court now faces a grave double jeopardy problem. The defendant has outstanding a prior conviction on the lesser included offense of kidnapping. The State has also attempted to retry the defendant on the greater offense of aggravated murder, which offense is the same offense as the kidnapping offense for double jeopardy purposes. This retrial is barred by the *Brown* line of double jeopardy cases.

The case at bar is different from any of the cases cited by the State in its Reply Memorandum. In none of those cases was there a situation where a defendant already had outstanding a prior conviction for the same offense. In all of those cases, the defendant had successfully overturned all of the convictions relating to the same offense. However, in this case, due to the State's Motion for Reconsideration, the defendant has outstanding a prior conviction for the same offense, which conviction acts as a bar to the State's retrying him on the greater offense of aggravated murder.

For the above reasons, the defendant respectfully requests that this Court enter a judgment of acquittal on the charge of aggravated murder.

Respectfully submitted,

/s/ DAVID C. GREER
Trial Attorney
600 First National Bank Building
Dayton, Ohio 45402
Telephone: (513) 223-3277

Joseph P. Buchanan, Trial Attorney
2580 Winters Bank Tower
Dayton, Ohio 45423
Telephone: (513) 223-6211

Attorneys for Defendant

[PROOF OF SERVICE OMITTED]

APPENDIX L

IN THE COMMON PLEAS COURT OF
MONTGOMERY COUNTY, OHIO

NOW IN THE COMMON PLEAS COURT OF
HAMILTON COUNTY, OHIO
UPON CHANGE OF VENUE

Montgomery County, Ohio – Case No. 75-CR-1359

Hamilton County, Ohio – Case No. B-3762363

STATE OF OHIO,

Plaintiff,

vs.

ALBERT LEE SCOTT, JR.,

Defendant.

ORDER

(Filed October 28, 1980)

YEAZEL, J.

Defendant's motion for a judgment of acquittal, pursuant to Criminal Rule 29(C) is OVERRULED.

.....

Judge

HERBERT C. JACOBSON,
WALTER DODSWORTH,
DENNIS LANGER,
On behalf of the State of Ohio;

DAVID C. GREER,
JOSEPH P. BUCHANAN,
On behalf of the defendant.

APPENDIX M

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

No. C-810028

STATE OF OHIO,
Plaintiff-Appellee,

vs.

ALBERT LEE SCOTT, JR.,
Defendant-Appellant.

DECISION

(Filed November 18, 1981)

Messrs. Lee C. Falke and Ted E. Millspaugh, Suite 300 Montgomery County Courts Building, 41 North Perry Street, Dayton, Ohio 45402, for Plaintiff-Appellee,

Mr. David C. Greer, 600 First National Bank Building, Dayton, Ohio 45402 and Mr. Joseph P. Buchanan, 2580 Winters Bank Tower, Dayton, Ohio 45402, for Defendant-Appellant.

PER CURIAM.

This cause came on to be heard upon the appeal, the transcript of the docket, journal entries and original papers from the Court of Common Pleas, Hamilton County, Ohio, the transcript of the proceedings, the briefs and the arguments of counsel.

Defendant-appellant Scott was indicted by the Montgomery County Grand Jury on three counts, *viz.*, extortion, kidnapping and aggravated murder. The aggravated murder count contains two specifications. The first specification is that the defendant committed the aggravated murder for the purpose of escaping detection, apprehension, trial or punishment for the offense of kidnapping. The second specification is that the aggravated murder was committed while the defendant was committing the aforementioned kidnapping.

Pursuant to defendant's motion for a change of venue the case was transferred to Hamilton County. On September 24, 1976, following a jury trial, the defendant was found guilty of aggravated murder with one specification [R.C. 2903.01(B), 2929.04(A)(7)], kidnapping [R.C. 2905.01(A)(1)] and extortion [R.C. 2905.11(A)(1)]. The defendant was found not guilty of the first specification of the aggravated murder charge (committing the murder for the purpose of escaping detection, apprehension, trial or punishment for the offense of kidnapping). Subsequently, the defendant was sentenced to death for the aggravated murder conviction, 7-25 years for the kidnapping conviction and 3-10 years for the extortion conviction. The defendant appealed all three convictions.

On November 29, 1978 this Court reversed defendant Scott's convictions on all three counts. On December 22, 1978, this Court granted the State's motion to reconsider. In so moving, the State specifically limited its request to a reconsideration of the reversals of the kidnapping and extortion convictions. Upon reconsideration, this Court affirmed the convictions for kidnapping and extortion. The aggravated murder conviction was reversed and that charge remanded for a new trial. This reversal was founded upon an erroneous jury instruction given by the trial court and upon unconstitutional procedures used in imposing the death sentence, *not* for insufficiency of evidence. The defendant appealed from the affirmances of the kidnapping and extortion convictions.

The State appealed the reversal of the aggravated murder conviction.

These appeals were consolidated and decided by the Ohio State Supreme Court in *State* v. *Scott* (1980), 61 Ohio St. 2d 155, 400 N.E.2d 375. The court, in affirming in part and reversing in part, mandated that the jury consider an involuntary manslaughter instruction upon the retrial on the aggravated murder charge. The court affirmed the Court of Appeals opinion in all other respects.

On remand, the aggravated murder trial of defendant commenced September 3, 1980. Defendant moved to dismiss the charge on double jeopardy grounds. This motion was overruled and the cause progressed to the jury. On September 30, 1980, a mistrial was declared as the result of the jury being unable to reach a verdict. Subsequently, defendant filed a motion for acquittal based, as was his motion to dismiss, upon double jeopardy grounds. This motion was overruled. It is from this order that the defendant brings the appeal *sub judice*.

I

Defendant Scott presents one assignment of error here:

> The trial court committed error prejudicial to the appellant when it refused to grant the appellant's motion for acquittal.

Defendant's argument in support of this assignment of error may be summarized as follows: At the outset of his retrial on the aggravated murder charge, he stood convicted of kidnapping. This kidnapping, factually, is a lesser included offense of the aggravated murder as charged and therefore, for double jeopardy purposes, they are the same offense under *Blockburger* v. *United States* (1932), 284 U.S. 299. Since this retrial is the second trial for the same offense, under *Blockburger, supra*, double jeopardy prohibits this retrial (citing *Brown* v. *Ohio* (1977), 432 U.S. 161; *Harris* v. *Oklahoma*

(1977), 433 U.S. 682, and other related cases). The defendant also denies that, through his earlier appeals, he has waived his right to assert a double jeopardy violation in this appeal. He reasons that he would not have stood convicted of kidnapping at the outset of the aggravated murder retrial if the State had not petitioned this Court to reconsider its original decision reversing all three convictions. This motion coming, as it did, at the behest of the State effectively negated any future double jeopardy waiver by the defendant according to his argument.

II

We have given careful consideration to the arguments of the defendant. We conclude that they are without merit.

As a starting point in our analysis of the issues presented, we first address this question: If the defendant had never been charged with extortion or kidnapping, could he be subjected to a retrial on the aggravated murder charge without offending the concept of double jeopardy? We find no bar to retrial in this situation.

The Double Jeopardy Clause of the Fifth Amendment is applicable to the states through the operation of the Fourteenth Amendment. *Benton* v. *Maryland* (1969), 395 U.S. 784. It is beyond question that a defendant who procures a judgment against him to be set aside may be tried anew on the same offense. *United States* v. *Ball* (1896), 163 U.S. 662. An exception to this proposition exists in the case of one whose judgment is reversed for insufficiency of evidence. *Burks* v. *United States* (1978), 437 U.S. 1. In the instant case the defendant, by pursing an appeal of the aggravated murder conviction, caused it to be set aside. The reversal was *not* necessitated by an insufficiency of evidence against the defendant. Therefore it is clear that, standing alone, there is no constitutional bar to a retrial of the defendant on the aggravated murder charge. The defendant claims, however, that additional factors are present which serve to remove the

case *sub judice* from the *Ball* holding. We will address these factors seriatim.

Defendant contends that, under *Blockburger, supra,* the kidnapping offense for which he was convicted [R.C. 2905.01 (A)(1)] is a lesser included offense of the aggravated murder charge [R.C. 2903.01(B)]. The Ohio Supreme Court has delineated the procedure this Court must follow when making this type of *Blockburger* analysis. The focus is on the *statutes* in question, not on the evidence proffered in a given case. A determination must be made as to whether each statutory provision requires proof of a fact which the other does not. Only then may the State seek conviction and punishment under multiple statutes in the same trial. *State* v. *Thomas* (1980), 61 Ohio St. 2d 254, 400 N.E.2d 897. *See also State* v. *Payne,* No. C-790257 (1st Dist. May 28, 1980).

Aggravated murder under R.C. 2903.01(B) is proscribed as follows:

> (B) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.

Kidnapping under R.C. 2905.01(A)(1) is proscribed as follows:

> (A) No person, by force, threat, or deception, or, in the case of a victim under the age of thirteen or mentally incompetent, by any means, shall remove another from the place where he is found or restrain him of his liberty, for any of the following purposes:
>
> (1) To hold for ransom, or as a shield or hostage;

It is readily apparent that aggravated murder, as charged, requires the purposeful causing of the death of another; kidnapping does not. Conversely, kidnapping, as charged, re-

quires the restraint or removal of another for the purpose of holding that person for ransom or as a shield or hostage; aggravated murder does not. Thus, the kidnapping conviction is not subsumed in the aggravated charge as a lesser included offense and therefore they are not considered the same offenses for double jeopardy purposes. The contention of the defendant to the contrary is without merit.[1]

Defendant also relies on the *Brown-Harris* line of decisions in asserting that the instant case falls outside of *Ball*. The *Brown, supra,* and *Harris, supra,* decisions stand for the proposition that when a conviction has been obtained for a lesser included offense, a subsequent prosecution for the greater offense (or vice versa) violates double jeopardy constraints. Defendant's reliance on these decisions is misplaced. As we have demonstrated, defendant was charged with two separate offenses (in addition to the extortion charge). Additionally, these offenses were initially prosecuted at the same time in the same proceeding. Thus the harm sought to be avoided, namely, an attempt to secure more than one prosecution or more than one punishment for the same offense, *Brown, supra,* 432 U.S., at 165, has been avoided.

Finally, the defendant attempts to avoid the application of *Ball* by claiming that the State, by moving for a reconsideration of this Court's initial decision in this case (reversing all three convictions) somehow made an election to forego reprosecution of the defendant on the aggravated murder charge. This assertion is not supportable. *United States* v. *Wil-*

---

[1] As we have previously stated in *State* v. *Payne, supra,* at 21, n.4, an apparent inconsistency exists in the application of the *Blockburger* analysis as applied by the United States Supreme Court in *Whalen* v. *United States* (1980), 445 U.S. 684, and the Ohio Supreme Court in *State* v. *Thomas, supra.* However, unless and until the Ohio Supreme Court mandates otherwise, we are constrained to apply the *Blockburger* test in the manner previously set forth in this decision. In so doing, we note that a petition for certiorari to the United States Supreme Court from *Thomas* has been denied.

son (1975), 420 U.S. 332, 345. This Court, in granting the State's motion for reconsideration, corrected its own error of law. Where the proscriptions against being twice put in jeopardy are not otherwise offended, it is clear that retrial of the defendant in the instant case is not enjoined because of the aforementioned motion to reconsider.

The judgment is affirmed.

KEEFE, P. J., DOAN and KLUSMEIER, JJ.

PLEASE NOTE:

The Court has placed of record its own entry in this case on the date of the release of this Decision.

APPENDIX N

THE SUPREME COURT OF OHIO

No. 82-92

THE STATE OF OHIO,)
)
City of Columbus,)

1982 TERM
To wit: March 9, 1982

STATE OF OHIO,

Appellee,

vs.

ALBERT LEE SCOTT, JR.,

Appellant.

APPEAL FROM THE COURT OF APPEALS
for Hamilton County

This cause, here on appeal as of right from the Court of Appeals for Hamilton County, was considered in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Hamilton County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of

Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court
this ..... day of ..... 19....
..... Clerk
..... Deputy

APPENDIX O

THE SUPREME COURT OF THE STATE OF OHIO

No. 82-92

THE STATE OF OHIO,)
)
City of Columbus.)

1982 TERM
To wit: March 9, 1982

STATE OF OHIO,

Appellee,

vs.

ALBERT LEE SCOTT, JR.,

Appellant.

MOTION FOR LEAVE TO APPEAL
FROM THE COURT OF APPEALS
for Hamilton County

It is ordered by the Court that this motion is overruled.

COSTS:

Motion Fee, $20.00, paid by David C. Greer.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court
this ..... day of ..... 19....
..... Clerk
..... Deputy

Opposition

Office - Supreme Court, U.S.
FILED
JUN 4 1982
ALEXANDER L. STEVAS,
CLERK

Case No. 81-2063

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

ALBERT LEE SCOTT, JR.,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE OHIO SUPREME COURT AND THE COURT OF APPEALS FOR HAMILTON COUNTY, OHIO

Office of LEE C. FALKE,
Prosecuting Attorney for
Montgomery County, Ohio
By: HERBERT M. JACOBSON
Chief Trial Counsel
Montgomery County Courts
Building
Suite 300, 41 North Perry Street
Dayton, Ohio 45402
Telephone: (513) 228-5126

COUNSEL OF RECORD FOR
RESPONDENT

(Additional Counsel on Inside Cover)

COURT INDEX PRESS, INC. — 215 E. Ninth Street, Cincinnati, Ohio 45202 — (513) 241-1450

TED E. MILLSPAUGH
Assistant Prosecuting Attorney for
Montgomery County, Ohio
APPELLATE DIVISION
7th Floor
Montgomery County
Administration Building
Post Office Box 972
451 West Third Street
Dayton, Ohio 45422
Telephone: (513) 225-4117

COUNSEL FOR RESPONDENT

DAVID C. GREER, Trial Attorney
400 Gem Plaza, Third and Main Streets
Dayton, Ohio 45402
Telephone: (513) 223-3277

JOSEPH P. BUCHANAN, Trial Attorney
2580 Winters Bank Tower
Dayton, Ohio 45423
Telephone: (513) 223-6211

COUNSEL FOR PETITIONER

QUESTION PRESENTED:

WHERE A DEFENDANT, PURSUANT TO A MULTIPLE COUNT INDICTMENT, IS BROUGHT TO TRIAL AND CONVICTED IN A SINGLE PROCEEDING AND AT THE SAME TIME ON SEPARATE CHARGES OF AGGRAVATED MURDER, KIDNAPPING AND EXTORTION, AND WHERE, PURSUANT TO DEFENDANT'S APPEAL, HIS CONVICTION FOR AGGRAVATED MURDER IS SUBSEQUENTLY REVERSED ON GROUNDS OTHER THAN INSUFFICIENCY OF THE EVIDENCE, DOES THE CONSTITUTIONAL PROHIBITION AGAINST DOUBLE JEOPARDY PRECLUDE RETRIAL OF THE DEFENDANT FOR AGGRAVATED MURDER?

Respondent submits that this question should be answered in the negative. The Courts of Ohio have agreed.

TABLE OF CONTENTS

Page

QUESTION PRESENTED

WHERE A DEFENDANT, PURSUANT TO A MULTIPLE COUNT INDICTMENT, IS BROUGHT TO TRIAL AND CONVICTED IN A SINGLE PROCEEDING AND AT THE SAME TIME ON SEPARATE CHARGES OF AGGRAVATED MURDER, KIDNAPPING AND EXTORTION, AND WHERE, PURSUANT TO DEFENDANT'S APPEAL, HIS CONVICTION FOR AGGRAVATED MURDER IS SUBSEQUENTLY REVERSED ON GROUNDS OTHER THAN INSUFFICIENCY OF THE EVIDENCE, DOES THE CONSTITUTIONAL PROHIBITION AGAINST DOUBLE JEOPARDY PRECLUDE RETRIAL OF THE DEFENDANT FOR AGGRAVATED MURDER? ... 1

TABLE OF AUTHORITIES ... IV

STATEMENT OF THE CASE ... 1

REASONS WHY WRIT SHOULD NOT BE GRANTED ... 4

The constitutional prohibition against Double Jeopardy contained in the Fifth Amendment to the United States Constitution does not preclude retrial of a defendant for an offense when his prior conviction for that same offense has been reversed on appeal on grounds other than insufficiency of the evidence. ... 4

CONCLUSION ... 7

TABLE OF AUTHORITIES

Cases:	Page
Blockburger v. *United States,* 284 U.S. 299, 52 S. Ct. 180 (1932)	4
Brown v. *Ohio,* 432 U.S. 161, 97 S. Ct. 2221 (1977)	4, 6, 7
Bryan v. *United States,* 338 U.S. 552, 70 S. Ct. 317 (1950)	5
Foran v. *Maxwell,* 173 Ohio St. 561, 184 N.E. 2d 398 (1962)	5
Forman v. *United States,* 361 U.S. 416, 80 S. Ct. 481 (1960)	5
Green v. *United States,* 355 U.S. 184, 78 S. Ct. 221 (1958)	5
Harris v. *Oklahoma,* 433 U.S. 682, 97 S. Ct. 2912 (1977)	4, 6, 7
Illinois v. *Vitale,* 447 U.S. 410, 100 S. Ct. 2260 (1980)	4, 6, 7
Jeffers v. *United States,* 432 U.S. 137, 97 S. Ct. 2207 (1977)	6
Stroud v. *United States,* 251 U.S. 15, 40 S. Ct. 50 (1919)	5
United States v. *Ball,* 163 U.S. 662, 16 S. Ct. 1192 (1896)	5
United States v. *Scott,* 437 U.S. 82, 98 S. Ct. 2187 (1978)	5
United States v. *Smith,* 584 F. 2d 759 (6th Cir. 1978), *cert. denied,* 441 U.S. 922 (1979)	5

Page

United States v. *Tateo*, 377 U.S. 463, 84 S. Ct. 1587 (1964) 5

Statutes:

Ohio Revised Code Section 2903.01 (B) 4

Ohio Revised Code Section 2905.01 (A) (1) 4

Other Authorities:

25 Ohio Jurisprudence 3d, Criminal Law, Section 382 5

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

Case No. 81-2063

ALBERT LEE SCOTT, JR.,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE OHIO SUPREME COURT AND THE COURT OF APPEALS FOR HAMILTON COUNTY, OHIO

STATEMENT OF THE CASE

On October 2, 1975, Petitioner was indicted by the Montgomery County (Ohio) Grand Jury on one count of Aggravated Murder with specifications in violation of Ohio Revised Code Sections 2903.01 (B), and 2929.04. Petitioner was also indicted (at the same time) on one count of Kidnapping in violation of Ohio Revised Code Section 2905.01, and one count of Extortion in violation of Ohio Revised Code Section 2905.11 (Petitioner's Appendix A, hereinafter Pet. Appx.). Pursuant to the granting of Petitioner's motion for a change of venue, the in-

stant cause was transferred to Hamilton County, Ohio. Following a jury trial, Petitioner was found guilty on September 24, 1976, of Aggravated Murder with one specification, Kidnapping, and Extortion. Thereafter, on November 23, 1976, the trial court filed its termination entry, Petitioner being sentenced to death on the Aggravated Murder charge, 7-25 years imprisonment on the Kidnapping charge, and 3-10 years imprisonment on the Extortion charge, said sentences to be served consecutively (Pet. Appx. B).

On December 20, 1976, Petitioner filed his Notice of Appeal to the Hamilton County (Ohio) Court of Appeals (Case No. C-76900). On November 29, 1978, the Court of Appeals issued its opinion, reversing Petitioner's convictions on all three counts (Pet. Appx. C). Thereafter, on December 22, 1978, the Court of Appeals granted Respondent's motion to reconsider its earlier decision (Pet. Appx. E). Upon reconsideration, the Court of Appeals affirmed Petitioner's convictions for Kidnapping and Extortion, but reversed and remanded for a new trial Petitioner's conviction for Aggravated Murder (Pet. Appx. F). Subsequently, both parties appealed to the Ohio Supreme Court. On February 6, 1980, the Supreme Court issued its decision (*State* v. *Scott,* 61 Ohio St. 2d 155) affirming Petitioner's convictions for Kidnapping and Extortion. On the Aggravated Murder charge however, the Supreme Court reversed and remanded the cause for a new trial, specifically requiring the trial court to instruct the jury on the lesser included offense of Involuntary Manslaughter (Pet. Appx. G).

On remand, the Hamilton County (Ohio) Common Pleas Court scheduled Petitioner's retrial on the Aggravated Murder charge to commence on September 3, 1980

(Case No. B-762363). On August 18, 1980, Petitioner filed his motion to dismiss the Aggravated Murder charge based upon double jeopardy grounds (Pet. Appx. H). Following the filing of a memorandum contra by Respondent and a memorandum in support by Petitioner, the trial court overruled said motion on August 28, 1980 (Pet. Appx. I). Trial on the Aggravated Murder charge commenced on September 3, 1980, and on September 30, 1980, a mistrial was declared as the result of the jury being unable to reach a verdict in the case (Pet. Appx. J). On October 14, 1980, Petitioner filed a motion for acquittal, again based upon double jeopardy grounds (Pet. Appx. K). This motion was overruled by the trial court on October 28, 1980 (Pet. Appx. L).

On November 26, 1980, Petitioner filed his Notice of Appeal to the Hamilton County (Ohio) Court of Appeals (Case No. C-810028), seeking reversal of the trial court's decision overruling his motion for acquittal based upon double jeopardy grounds. On November 18, 1981, the Court of Appeals issued its opinion affirming the trial court's denial of Petitioner's motion for acquittal (Pet. Appx. M). Thereafter, on December 18, 1981, Petitioner filed his Notice of Appeal to the Ohio Supreme Court. On March 9, 1982, the Ohio Supreme Court (Case No. 82-92) denied Petitioner's motion for leave to appeal (Pet. Appx. N, O).

REASONS WHY WRIT SHOULD NOT BE GRANTED

The constitutional prohibition against Double Jeopardy contained in the Fifth Amendment to the United States Constitution does not preclude retrial of a defendant for an offense when his prior conviction for that same offense has been reversed on appeal on grounds other than insufficiency of the evidence.

In his Petition for a Writ of Certiorari, Petitioner argues that his outstanding conviction for Kidnapping bars further prosecution of him on the Aggravated Murder charge. This argument is premised upon the Double Jeopardy protection against multiple prosecutions for the same offense after conviction and upon Petitioner's contention that Kidnapping (Ohio Revised Code Section 2905.01 (A) (1)) is factually a lesser included offense of Aggravated Murder (Ohio Revised Code Section 2903.01 (B)); hence, the two offenses are really the same offense for purposes of double jeopardy analysis under the test enunciated by this Honorable Court in *Blockburger* v. *United States*, 284 U.S. 299, 52 S. Ct. 180 (1932). Such an argument, however, completely ignores the procedural history of the instant cause.

Unlike the line of cases relied upon by Petitioner in support of his argument (See: *Brown* v. *Ohio*, 432 U.S. 161, 97 S. Ct. 2221 (1977); *Harris* v. *Oklahoma*, 433 U.S. 682, 97 S. Ct. 2912 (1977); *Illinois* v. *Vitale*, 447 U.S. 410, 100 S. Ct. 2260 (1980)), the case at bar does *not* involve a situation where a defendant was initially brought to trial only on the lesser included offense (i.e. Kidnapping), convicted, and then subsequently brought to trial in a sec-

ond, wholly separate and successive prosecution on the greater offense (i.e. Aggravated Murder). Rather, Petitioner was initially brought to trial at the same time and in a single proceeding on all three charges contained in the indictment (including Aggravated Murder and Kidnapping). Following said trial, Petitioner was found guilty of all three charges (i.e. Aggravated Murder, Kidnapping and Extortion). Petitioner then appealed his convictions which ultimately resulted in the reversal of his conviction for Aggravated Murder based upon grounds other than insufficiency of the evidence.

In such a case, the sole issue for determination is whether Petitioner may be retried for an offense when his prior conviction for that same offense has been set aside or reversed as a result of his appeal. The answer to such question, which is supported by a long line of decisions from both this Honorable Court and other jurisdictions, is that the Double Jeopardy provisions contained in both the United States and Ohio Constitutions do not bar retrial of Petitioner under such circumstances. *United States* v. *Ball,* 163 U.S. 662, 16 S. Ct. 1192 (1896); *Stroud* v. *United States,* 251 U.S. 15, 40 S. Ct. 50 (1919); *Bryan* v. *United States,* 338 U.S. 552, 70 S. Ct. 317 (1950); *Green* v. *United States,* 355 U.S. 184, 78 S. Ct. 221 (1958); *Forman* v. *United States,* 361 U.S. 416, 80 S. Ct. 481 (1960); *United States* v. *Tateo,* 377 U.S. 463, 84 S. Ct. 1587 (1964); *United States* v. *Scott,* 437 U.S. 82, 98 S. Ct. 2187 (1978). See also: *United States* v. *Smith,* 584 F. 2d 759 (6th Cir. 1978), *cert. denied,* 441 U.S. 922 (1979); *Foran* v. *Maxwell,* 173 Ohio St. 561, 184 N.E. 2d 398 (1962); 25 Ohio Jurisprudence 3d, Criminal Law, Section 382 (and the cases cited therein).

The above cited authorities clearly and unequivocally

espouse the doctrine that the Double Jeopardy Clause does not bar retrial of a defendant for an offense when his prior conviction for that same offense has been set aside as a result of his appeal. Given the procedural history of the instant cause (i.e. the Aggravated Murder conviction being reversed as a result of Petitioner's appeal), this doctrine is dispositive of the question now before this Honorable Court. Moreover, said doctrine stands as a well recognized exception to the general rule articulated in *Brown* v. *Ohio,* supra, (and its progeny); namely, that the Double Jeopardy Clause bars multiple prosecutions for the same offense after conviction. *Jeffers* v. *United States,* 432 U.S. 137, 97 S. Ct. 2207 (1977). In the instant cause, the record clearly demonstrates that Petitioner was tried and convicted (in a single trial) of Aggravated Murder, Kidnapping and Extortion. As a result of his appeal, Petitioner's conviction on the Aggravated Murder charge was reversed. In such a case, it is clear that Petitioner's retrial on the Aggravated Murder charge is not barred by Double Jeopardy.

Respondent recognizes the general rule set forth in the *Brown* v. *Ohio* line of cases cited by Petitioner; namely, that the Double Jeopardy Clause precludes a successive prosecution on a greater offense after a defendant has already been convicted of the lesser included offense (*Brown* v. *Ohio,* supra; *Harris* v. *Oklahoma,* supra; *Illinois* v. *Vitale,* supra). As previously pointed out however, exceptions to this general rule exist where (as here) the subsequent trial is, in fact, a retrial of Defendant for an offense when his prior conviction for that same offense has been set aside as a result of his appeal. Moreover, the context in which the general rule established in *Brown* v. *Ohio,* supra, and its progeny has arisen, consistently involves those situations where an accused is first brought to trial *only* on the lesser included offense, is convicted, and then

is subsequently brought to trial in a separate, successive prosecution on the greater offense, or vice versa. (See: *Brown* v. *Ohio,* supra; *Harris* v. *Oklahoma,* supra; *Illinois* v. *Vitale,* supra). This is markedly different from the situation at bar where Petitioner was initially brought to trial at the same time on all three charges contained in the indictment and was convicted of all three, his conviction for Aggravated Murder being subsequently reversed as a result of his appeal. In this latter type of situation, the *Brown* v. *Ohio* line of cases being relied upon by Petitioner is inapposite.

Given the procedural history of the instant cause (including the fact that Petitioner was tried at the same time and in a single proceeding on separate charges of Aggravated Murder, Kidnapping and Extortion, and was convicted of all three, his conviction for Aggravated Murder being subsequently reversed as a result of his appeal), it is clear under the long line of authority emanating from this Honorable Court as well as other jurisdictions that the Double Jeopardy Clause does not preclude retrial of Petitioner in the instant cause inasmuch as the constitutional prohibition against Double Jeopardy does not preclude retrial of a defendant for an offense when his prior conviction for that same offense has been reversed or set aside as a result of his appeal.

CONCLUSION

This Honorable Court should deny the Petition for a Writ of Certiorari. The Courts of Ohio have not decided the instant double jeopardy question in a way that conflicts with applicable decisions of this Honorable Court. Moreover, the instant cause does not present any important

federal question which has not been, but needs to be, settled by this Court.

Respectfully submitted,

Office of LEE C. FALKE,
Prosecuting Attorney for
Montgomery County, Ohio
By: HERBERT M. JACOBSON
Chief Trial Counsel
Montgomery County Courts
Building
Suite 300, 41 North Perry Street
Dayton, Ohio 45402
Telephone: (513) 228-5126

COUNSEL OF RECORD FOR
RESPONDENT

TED E. MILLSPAUGH
Assistant Prosecuting Attorney for
Montgomery County, Ohio
APPELLATE DIVISION
7th Floor
Montgomery County
Administration Building
Post Office Box 972
451 West Third Street
Dayton, Ohio 45422
Telephone: (513) 225-4117

COUNSEL FOR RESPONDENT